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Supreme Court, U.S.
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In the Supreme Court of the United States

No. 1370
OCTOBER TERM, 1970.

ALICE MARIE LAMP,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION
and
DEN NORSKE AMERIKALINJE A/S,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

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APPENDIX.

COMMISSIONERS' AWARDS AND OPINIONS FOR CLAIMANTS: ALICE MARIE LAMP, ADMINISTRATRIX; JEAN COOK, ADMINISTRATRIX; BARBARA J. FUHRMAN, ADMINISTRATRIX; MARION JONES, ADMINISTRATRIX; ELIZABETH HASKE, ADMINISTRATRIX; BILLY R. HOLLEY, MICHAEL IDALSKI, JEROME KIERZEK, RAPHAEL PRZYBYLA, WALTER TULGETSKE, RONALD G. PIECHAN AND STANLEY P. MULKA.

(Filed May 7, 1969.)

In Admiralty No. 65-6.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

In the Matter of the Petition of
UNITED STATES STEEL CORPORATION,
As owner of the Steamship Cedarville for Exoneration From or Limitation of Liability.

LEGAL RECORD

On May 7, 1965, the S/S *Cedarville* (owner U. S. Steel) and the M/V *Topdalsfjord* (owner Den Norske Amerika-Linje, A/S) collided in the Straits of Mackinac within the State of Michigan. A third vessel the M/V *Weissenburg* (owner Hamburg Amerika-Linje) was involved in maneuvers and inter-ship communications prior to, during and after the collision. Defendant Den Norske filed a Petition for Exoneration from or Limitation of Liability in the U. S. District Court for the Northern District of Illinois at Chicago, May 10, 1965. Defendant U. S. Steel filed a similar petition in the U. S. District Court for the Northern District of Ohio, Eastern Division, on May

15, 1965. Owner Hamburg-Amerikalinje did likewise in the Chicago, U. S. District Court about the same date. The two actions pending in Chicago were transferred to Cleveland and consolidated with the U. S. Steel proceedings initiated here.

Immediately after the collision, a U. S. Coast Guard Board of Inquiry conducted extensive hearings. With litigation under way, the parties engaged in full and comprehensive discovery activities. The three shipowners ultimately reached an agreement with respect to their liabilities. On May 31, 1967, they stipulated with the several death and personal injury claimants for: (1) dismissal of all claims against the *Weissenburg* and her owners: (2) dismissal of all claims for vessel loss or damage, all claims for consequential damages and all claims for punitive damages against the *Topdalsfjord* owners: (3) judgments for compensatory damages in amounts to be determined and to be entered in favor of all the personal injury and death claimants against the U. S. Steel and Den Norske. All legal issues were thus resolved except claims for punitive damages (2) against U. S. Steel and determination of the compensatory damages to be awarded to the personal injury and death claimants.

Trial on the claims for punitive damages against U. S. Steel was held before Hon. James C. Connell, U. S. District Court in Cleveland, during the summer of 1967. On October 27, 1967, Judge Connell, in a written opinion, found U. S. Steel liable for punitive damages. This decision upon appeal to the U. S. Court of Appeals, Sixth Circuit, was reversed and remanded on March 7, 1969, in Case No. 18481.

Pursuant to an order authorizing and empowering Commissioners to take evidence, report the same with findings of fact and conclusions of law on the issue of

compensatory damages for all personal injury and death claimants, Judge Connell assigned these authorities to Oliver Schroeder, Jr. and Robert Grogan as Commissioners on November 27, 1967. The Court also vacated its previous order prohibiting discovery on the issue of compensatory damages. Discovery on this issue began December 4, 1967, and continued almost contemporaneously with the hearings before the Commissioners which began December 13, 1967. Discovery proceedings were concluded shortly prior to November 7, 1968, and hearings before the Commissioners were concluded on that date. A total of 23 days of hearings were held, all in the U. S. District Court at Cleveland except one hearing in the county courthouse at Alpena, Michigan.

Ten death claims and 22 personal injury claims had been filed or had sought leave to file as the result of this maritime disaster. Thirty actual claims were finally recognized. After settlement negotiations were had by all thirty claimants and their attorneys with the full encouragement (3) of the Commissioners, five death claims, represented by three different sets of claimants attorneys, and thirteen personal injury claims, represented by four different sets of claimants attorneys, were settled; funds have been paid and satisfaction of judgments have been entered. Five death claims and seven personal injury claims remain for the Commissioners' determination.

Both Commissioners have collaborated on general problems involved in these twelve pending claims. Commissioner Grogan has assumed specific responsibility for the awards in two personal injury claims—Idalski and Tulgetske. Commissioner Schroeder has assumed specific responsibility for the awards in all five death claims and the remaining five personal injury claims.

THE COLLISION INCIDENT

The tragic events of May 7, 1965, arising out of the maritime collision between the *Cedarville* and *Topdalsfjord* present two levels of factual experiences. One level is represented by the individual experiences of each decedent seaman and surviving seaman. These facts will be considered with each of the individual claims. But underlying these individual experiences of the five decedents and the seven surviving claimants is the general collision incident affecting directly the personal experiences of the individual decedents and survivors. The collision incident is relevant to each particular claim. For death claims, the legal issue of pain and suffering from collision impact to final sinking of the *Cedarville* can only be resolved from facts and inferences arising out of the general collision incident. For survivors' claims, the legal issue of injury and disability, especially psychiatric, can only be understood and resolved as a personal (4) experience encompassed within the general collision incident.

What happened within this general collision incident is best revealed in Judge Connell's written opinion which fixed punitive damage liability against U. S. Steel after a vigorous and comprehensive trial in the U. S. District Court at Cleveland.

In words common to the sea—"Sailors know their ships." What kind of ship was the *Cedarville*? Built in 1927, this "self-unloader" had sixteen hatches with no water-tight bulk heads.

> Its equipment included a revolving conveyor belt, 450 feet long and 4 feet wide, contained within a tunnel below the ship's holds along the center line of the vessel. At the bottom of each hold there was an opening through which the cargo passed down into the tunnel and onto the conveyor belt. Any water

> which might be taken into any one of the holds of the vessel through the shell necessarily passed down into the tunnel. In the event of the breach of the shell of the vessel, the water, in passing through any compartment, would immediately find its way into the tunnel and thereupon fill all of the holds. The vessel had no watertight bulkheads to contain the water in any compartment where the shell of the vessel might be opened up. (Opinion, pp. 3-4.)

To the sailors aboard the *Cedarville* these facts were obvious. They sailed and lived under these dangerous conditions. Even the operating manager of the U. S. Steel fleet admitted that if a collision opened the hull below the water-line the vessel would "sink like a brick." (Opinion, p. 4.)

On May 7, 1965, the officers and men of the *Cedarville* were also aware of additional facts prior to the disaster: a cargo of 14,411 tons of limestone was aboard, the freeboard was 10 feet and ¼ inch, fog shrouded the area, the vessel was proceeding at full speed. Then at 0945 the impact occurred on the *Cedarville's* port side below the water-line causing a (5) rush of water into all compartments via the conveyor tunnel. The general alarm was sounded. Men not on watch reported to their lifeboat stations. (Opinion, p. 10.) The mortally wounded ship began sinking at a rate of three inches per minute. Her speed was cut down to two or three miles per hour. The men on deck watched these fatal happenings; the men below remained at their stations feeling the unnatural movements of the ship, if not seeing its slow but sure demise. All awaited opportunity to effect their own rescue and safety. They listened for the order to "abandon ship." None broke maritime ranks, even though no order was ever given. (Opinion, p. 13.) They left the *Cedarville* only upon its final convulsion as the ship capsized.

> The end came quickly as the decks came awash. The *Cedarville* convulsed and capsized throwing the men, a lifeboat and a raft into the water as she went down taking with her the remainder of the trapped crew. Some of those thrown clear into the water were sucked down but were brought up again by the life-jackets. Captain Joppich, who had stepped out on the bridge from the pilothouse when he saw that the end was near, was thrown clear off the vessel from his high perch. The third mate, Cook, whom he left on duty in the pilothouse, was sucked under and he suffered the same agonizing fate as the others who were trapped in the vessel. Even greater loss of life was averted by the commendable action of the Captain of the *Weissenburg*.
>
> * * * * *
>
> Ten men perished in the water; four from the engineroom department, Chief Engineer Lamp, Third Assistant Engineer Radtke, Stokerman Jones and Oiler Wingo; five men in the Deck Department lost their lives, Third Mate Cook, Deck Watchman Fuhrman, Deck Watchman Jungman, Wheelsman Haske and Wheelsman Asam; one man in the Steward's Department, Bredow. The remaining members of the crew suffered the physical ordeal of exposure in icy water and the mental anguish of death staring them in the face. (Opinion, p. 14)

The crew members who remained at their posts in the engineroom and below deck or at life boat stations on deck did experience forty (6) minutes of waiting as the ship steadily sank, as her speed was reduced, as she took on water, as she finally convulsed, capsized and sank. These loyal crew members experienced those final last few minutes of rushing waters, of convulsing and capsized vessel, and ultimate commitment to a watery grave. How long is not determinable in a precise time period. One fact is certain—this frightful experience of suffering and

dying was not instantaneous. A valid period of time elapsed. The laws of nature, the laws of maritime experience and the laws of reasonable probability speak acceptable inferences of fact which this court can, must and does accept. Forty minutes of maritime dying with a final few minutes of overwhelming fatal torture was shared by all the dead and the survivors. (Opinion, pp. 42-44)

This general collision incident was one which, with reasonable probability, would produce physical and mental injuries to all crew members—those who died and those who survived. Reasonable men can understand and accept these facts of the sinking and reasonable inferences can be made therefrom. How this general collision incident affected each individual for purposes of compensatory damages must be and is determined in each individual claim.

ELEMENTS OF COMPENSATORY DAMAGES IN DEATH CLAIMS

Introduction

Liability for compensatory damages in all the death claims is bottomed on two statutes: against defendant U. S. Steel, liability rests upon the Jones Act, 46 U.S.C. Sec. 688 (1920) and, by incorporation, the Federal Employers' Liability Act, 45 U.S.C. Sec. 51-60 (1908), because the decedent seamen were employees of U. S. Steel; against defendant Den Norske, liability rests upon the Michigan Wrongful Death Act (M. C. L. A., (7) Sec. 600.2922), because of the absence of the employer-employee relationship. Liability under both the Jones Act and the Michigan Act is measured by *pecuniary* loss. The court is obligated first to determine what are the elements of pecuniary losses and second to place a monetary value on these elements which at the date of judgment will substi-

tute as completely and satisfactorily as possible the pecuniary losses occasioned by the death of the breadwinner and head of the family.

Legal guidelines for defining the elements of damages are furnished in these cases: *Petition of Moore-McCormack Lines, Inc.*, 184 F. Supp. 585 (S.D.N.Y., 1960), modified in part *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir., 1961) (hereinafter referred to as "The Mormackite"); *Petition of Petroleum Tankers Corporation*, 204 F. Supp. 727 (S.D.N.Y. 1960) (hereinafter referred to as "Empress Bay"); *Gardner v. National Bulk Carriers, Inc.*, 221 F. Supp. 243 (E.D. Va., 1963), aff'd. 333 F.2d 676 (4th Cir., 1964) (hereinafter referred to as "The Bulkcrude"); *Petition of Oscar Tiedemann & Co.*, 236 F. Supp. 895 (Del. 1964) (hereinafter referred to as "Mission San Francisco"); *Petition of Marina Mercante Nicaraguense*, 248 F. Supp. 15 (S.D.N.Y. 1965), modified 364 F.2d 118 (2d Cir., 1966) (hereinafter referred to as "The El Salvador"). The case of primary importance in this group, however, is acknowledged to be "The El Salvador."

The same guidelines are applicable both against U. S. Steel and Den Norske even though their sources of liability stem from two independent statutes—the federal statute and the Michigan statute. As for the liability of Den Norske under the Michigan statute, however, two additional elements are claimed: loss of consortium to the widow (Hanson/Mann Brief pp. 3-4, (8) Radka/Robb Brief pp. 16-20) and loss of love, affection and companionship to emancipated adult children of decedents (Freedman/Traverse Brief pp. 37-39, Radka/Robb Brief pp. 16-20).

Practical guidelines for evaluating the elements of damage as monetary sums are also available. "The El Salvador" opinion provides this helpful guide:

> The damage determination does not lend itself to precise determination in the manner of an apothecary filling a prescription; at best it represents an empirical judgment based upon the evidence in each case, practical experience and common sense.
>
> "The El Salvador," 248 F. Supp. 15, 27 (S.D.N.Y. 1965)

Emphasis must be made that some elements of compensatory damage such as pain and suffering in reality create insolvable problems:

> Concededly, there is also no way by which suffering can either be measured or compensated for in money. But courts are nonetheless required to do precisely that, and they have attempted to resolve this insolvable problem in scores of cases.
>
> "The Mormackite," 295 F.2d 583, 587 (2d Cir. 1961)

The obligation still remains to solve all these practical issues and the Commissioners now proceed to do so.

The individual elements of compensatory damages applicable to all death claims will first be determined. Then a general economic analysis will be made. Finally each death claim will be evaluated separately. In determining both the law governing pecuniary losses and the dollar value of the pecuniary losses, the Commissioners recognize that they must decide on a probability spectrum which runs from absolute certainty to sheer fantasy. Our obligation is to hew toward the certainty band on the probability spectrum not with complete rigidity (9) but with a sense of understanding, equity and common sense befitting the high purposes of a court of law adjudicating an admiralty case.

I. Damages From Date of Death (May 7, 1965) to Date of Judgment (May 7, 1969)

A. The loss of earning capacity which provided pecuniary support for each decedent's family is the primary element of damage. Earning capacity includes: wages plus such economic elements as pension, hospitalization and medical benefits, savings fund plans, stock option plans, vacation plans. Two adjustments are required to refine this total figure to obtain the true loss of earning capacity to the surviving family: personal expenses of the decedent should be deducted as well as the decedent's share of the living and household expenses for the whole family unit. All these items should then be totalled without discount for the four year period to date of judgment. This total sum represents a debt past due, not subject to the vagaries of the unknown future.

No adjustment is made for payment of Social Security benefits and insurance on the decedent's life. Social Security benefits to the family represent governmental social policies not employment contract relations. In reality the worker, although he admittedly pays only one-half the Social Security tax, can be said to be paying the employer's one-half share which stands in lieu of a larger wage. In the economic world, the payment of Social Security taxes by the employee and the employer represents a meaningful social benefit encompassed within the worker's whole wage. To deduct Social Security payments to survivors as a reduction in the damage element identified as loss of earning capacity would present a false figure of what was actually lost. The employee has already paid for this benefit (10) which is a social insurance for his family. It is irrelevant to the wrongful death action.

As for life insurance payments made upon the decedent's death, the same result should be imposed, but for

a different reason. Life insurance is a private contract with premiums paid to cover the contingency of death. If the decedent worker paid the premiums, or if the employer paid the premiums as a fringe benefit in lieu of a higher wage, the contract became executed and payable immediately upon death. Life insurance does not represent a loss of earning capacity in a tort situation; it represents a loss of life in a contract arrangement, separate and independent from the tort relationship.

No adjustment is made for income tax either. This decision is applied both to the pre judgment period for pecuniary losses and to the post judgment or future pecuniary losses. The legal conflict over adjustment for income tax has been sharp and conflicting. The details of this legal battle are graphically explained by the district federal court in *Brooks v. United States,* 273 F. Supp. 619 (S.C. 1967) in a decision which applied the income tax deduction. A legal scholar commends this decision to adjust for income tax and diagnoses the legal status of this controversial issue in Patrick H. Hope, "Damages—Rightful Recovery for Wrongful Death—The Income Tax Factor," 46 *North Carolina L. Rev.* 941 (1968).

The income tax issue has been wisely analyzed in "The El Salvador," 364 F.2d at 125 (2nd Cir. 1966) where the following guidelines were propounded:

> * * * estimated future income taxes should not be deducted in "the great mass of litigation at the lower or middle reach of the income scale, where (11) future income is fairly predictable, added exemptions or deductions drastically affect the tax * * * the plaintiff is almost certain to be undercompensated for loss of earning power in any event." The undercompensation would arise from the erosion of the recovery due to the failure to award attorneys' fees, almost always high in this type of litigation because of their con-

tingent nature, and to continuing inflation; we noted also that deduction of the income tax on the estimated earnings simpliciter took no account of the tax payable on the income from the lump sum awards given to replace them, * * * a factor particularly important in death cases, both because the income from the lump sum will be taxable without benefit of income splitting unless the surviving spouse remarries. We recognized, however, that in cases "at the opposite end of the income spectrum," failure to deduct for taxes would result in an award that "would be plainly excessive even after taking full account of the countervailing factors we have mentioned," in such cases some appropriate adjustment should be made.

and further at p. 126

We said, in a passage previously quoted, that deduction should not be made in "the great mass of litigation at the lower or middle reach of the income scale" and that "the line was not approached" by a bachelor earning $4,800 a year. The illustrative examples where a deduction would be required were the cases of a plaintiff with 'potential earnings of $100,000 a year,' * * * The opinion did not suggest that the exception was to be limited to such extreme cases; indeed it has subsequently been held applicable to a geologist with anticipated annual income of $16,000 and $25,000. LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266, 276 (2 Cir.), cert. denied, 382 U.S. 878, 86 S. Ct. 161, 15 L. Ed. 2d 119 (1965). We see no basis, however, for thinking that workers on tugboats in New York Harbor should be considered among those high income earners to which the exception applies. The estimated annual earnings here, $11,000 to $11,500 for Fargo, $9,300 to $10,500 for Salvesen, and $11,000 to $11,500 for Evans, bear more resemblance to McWeeney's $4,800, Montellier's $12,000 and Cunningham's $6,300, all factored upward for subsequent inflation, than to Dr. Leroy's

> $16,000 to $25,000 estimated to produce total future income (12) of some $600,000. Death cases, where the deprivation of earnings is certain, would seem particularly poor candidates for extending the deduction.

We recognize all these arguments and accept "The El Salvador" position. We hold that the death claims of Fuhrman ($8,200 yearly earning capacity at death), Haske ($8,200), Cook ($11,600) and Jones ($8,600) are all within the lower and middle income levels to which the "El Salvador" rule applies no income tax deductions.

We must now go further, however. The dictum in "El Salvador" suggests that in cases where the earning capacity loss figure would be "plainly excessive" a deduction of income tax would be appropriate. The *Lamp* claim ($24,000 yearly earning capacity at death) might appear to be one which could fall into this especially high income category. We now decide this issue in the following way: we hold that $24,000 annual earning capacity does not fall into that high income level which would require income tax deduction. The total future income of the decedent in *Leroy v. Sabena World Airlines* upon which the "El Salvador" decision relies was $600,000. In the *Lamp* claim we project less than two-thirds that sum. In addition to this difference in economic facts we find much more important certain fundamental legal differences. We believe these differences require that the income tax deductions must be rejected even in the extreme cases of high income.

First, how "extreme" is "extreme"? The law demands fixed guidelines in measuring damages not fluid speculations. All courts acknowledge the difficulties even impossibilities of fixing probable dollar values on future incomes. By adding the necessity of speculating on the future income tax value a further conjecture is built into

an already (13) speculative process. If no deductions for income tax are recognized greater certainty is obtained for one speculation is removed. In addition, more precise economic evaluation of a claim can be made.

The certainty of no deduction for income tax will also aid settlement negotiations. If there be some unknown line above which the loss of earning capacity element requires income tax deduction everyone will strive to guess the line and to seek formal litigation hopefully to get under the line if claimant or over the line if defendant. This unknown factor of a mysterious line drawn at varying levels by different courts will encourage formal litigation and discourage settlement. Any procedure or rule which encourages settlement of tort actions is the wiser rule in this period of excessively high numbers of tort cases. The parties themselves are the best judges of the dollar value to the family of a decedent's life or the dollar value of personal injury claim. Courts should be used only as a poor, but final, last resort. By adding an unknown dividing line the uncertainty generated will discourage settlements because parties will be tempted to take their cases to court hoping to gain the advantage of either being under the mystical line or over it.

Another cogent reason for an absolute rule against recognizing income tax deduction is the Congressional policy enunciated in the Internal Revenue Code, 26 U.S.C. Sec. 101, which states that compensatory sums received on account of personal injuries or sickness are exempt from income taxation. While the judiciary has the exclusive authority to determine the dollar value of any compensatory claim, including income tax deduction as an element for consideration, we believe it is unwise in policy to do so. (14) It would appear to create a contradiction in federal government purpose to apply income tax de-

duction in tort law when tax law expressly provides the opposite policy.

A further reason for this absolute rule rejecting income tax deductions rests upon the fact that the tortfeasor is the sole beneficiary. An aroma of unjust enrichment pervades the scene. The victim's next of kin lose dollars in the economic value of decedent's life; the government does not gain these dollars in taxes; the wrongdoer retains the dollars for his own benefit. He who is least entitled to the dollars because he is liable for the whole unfortunate disaster nevertheless keeps them. The moral conscience, so notable in admiralty rules, is not strengthened; it is polluted by such a rule.

The most cogent reason to deny income tax deduction at all income levels is the economic fact that in wrongful death and personal injury cases the entire litigation process rests on a contingent fee contract between attorney and client. These contracts are legal, ethical and highly effective to provide the injured party with the best legal representation. The contingent fee contract system works especially well in cases like these now being considered. Complex economic facts, intricate family relations, strong defenses by large corporate interests all demand the best counsel for the individual person who seeks the redress to which he is entitled under the law. The contingent fee arrangement stimulates the best efforts of counsel for obvious economic reasons; if successful the legal fee is forthcoming and, with the fee usually based on a percentage of award, the higher the award the greater the fee. Neither the legislature nor the judiciary in the federal or state jurisdictions have seen fit to include attorney's fees (15) reimbursement for wrongful death claimants in compensatory damage actions. The express purpose of compensatory damages is repeatedly stated as:

> * * * the damages recoverable under the statute are held to be equivalent to compensation for deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. * * * The liability is for pecuniary damages and for that only.
>
> *Cleveland Tankers v. Tierney,* 169 F.2d 622, 624 (6th Cir., 1948)

On the other hand, the courts refuse to acknowledge the economic impact of reducing an award for pecuniary loss by one-third as a legitimate fee for legal services. Candidly, the surviving spouse and children do not receive what the statutes and decisions say they are entitled to: "compensation for deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased." The claimants received the value of pecuniary benefits deprived *discounted* by a major fraction, one-third or more for legal fees. We are restricted from specifically awarding attorney's fees in compensatory damages claims as explained *infra* p. 22. We are not restricted, however, from denying income tax deductions as an indirect act to provide the claimant a total sum closer in value to what the statutes and decisions say a claimant should receive but which legislatures and courts deny to claimants by refusing to recognize the economic impact of the contingent fee contract for legal services.

This argument for no income tax deduction because of the economic impact of the contingent fee for legal services on the true pecuniary loss is especially sensitive. In the *Cedarville* claims we already have three death claim settlements as a matter of public record—*Radtke, Asam* and *Wingo.* In each a contingent fee of one-third has been approved by court order. See "A Study of Contingent Fees," 33 *Insurance Counsel J.* 197 (1966).

(16) A fixed rule of no deduction for income tax, federal or state, has the more valuable legal virtues: it is simple to understand; it encourages settlement negotiations because of absolute certainty without line-drawing at some mysterious level separating a mythical high income from a low or middle income; it is highly conscionable in admiralty proceedings which are noted for their beneficence to seamen by such other equitable rules as maintenance and cure. The same rule has commensurate value for economic reasons: the claimant receives a sum closer to the real value of pecuniary loss to which he is legally entitled under the contingent legal fee system now utilized in tort litigation in the United States. We adopt the rule of no income tax deduction without equivocation.

B. *The value of decedent's services* around the home is a recognized element of damages. None disputes this element.

C. *The value of decedent's counsel, guidance, care, and nurture of his minor children* is also an uncontested element of damages.

D. *The conscious pain and suffering* of each decedent from the moment of the collision to his death is held to be compensable also. We follow the rule announced in *Cleveland Tankers v. Tierney*, 169 F.2d 622, 626 (6th Cir. 1948):

> Numerous cross-appellants also renew their contention that they should have been allowed recovery for pain and suffering of the decedents. Such an element of damages may be included in the judgment if it is shown that the injured person, while he lived, underwent a compensable physical injury resulting in pain and suffering. * * * The commissioner found that there was no evidence upon this point. The record does not show just when the Cleveco sank except that it sank after the Admiral was lost. * * *

The record is devoid of evidence from which a court could determine that the various decedents endured pain and suffering before they died.

(17) The recent case of "The El Salvador," 248 F. Supp. 15 (1965) (see cases in footnote 34, p. 28) also supports this element of damages. The qualifying factor is the requirement of proof that death was not instantaneous. Obviously if it were, no conscious pain and suffering could occur. Conscious pain and suffering after the physical impact of the collision, we hold, includes not merely the jarring of a human body but more important the emotional impact of a terrifying human experience. The period of time, in which the "Cedarville" was sinking, was 40 minutes. The last few minutes of terror when the capsizing and catapulting occurred are substantiated by eye witness accounts of the survivors and the reasonable inference which common sense can draw from the size, weight and prior movements of the sinking ship. The whole experience was not instantaneous. It occupied a period of minutes. Conscious pain and suffering occurred as the lost seamen waited for the order to abandon ship, which order never came. Decedents watched, struggled, and suffered as the waters of the Straits of Mackinac slowly engulfed them. Expert psychiatric evidence on the suffering of dying by water asphyxia was offered. We believe it was weak because none has truly experienced this process and lived to explain it. We place our finding on the fact that emotional trauma is well documented from human experience and the pain and suffering of dying by a man who wants to live is reasonably probable in the nature of human affairs. The period of such pain and suffering was minutes; the intensity was supreme; the watery grave was triumphant in the wake of a desperate struggle to live—the most powerful drive in healthy, normal human beings as were these decedents.

E. *The value of counsel, care, and guidance to the widow* has been accepted as an element of damage. "The Mission San Francisco," 236 F. Supp. 895 (D.C. Del. 1964) so recognized this element with the requirement **(18)** that evidence to justify such payment be on the record. We follow this rule.

F. *The value of the loss of consortium to the wife* is also to be applied against defendant Den Norske as a valid damage under the Michigan Wrongful Death Act. Admittedly in the early case of *Michigan Central R. Co. v. Vreeland,* 227 U.S. 59 (1912), the pecuniary loss to a minor child in the death of a parent was acknowledged but loss to the widow was not. It is significant however that 57 years ago in the earliest era of wrongful death claims even this court said at page 74:

> It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements "care and advice." But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction given, the jury were left to conjecture and speculation.

The wiser rule now appears to be that, if proof of loss of consortium to the wife be made, a valid element of damages will occur under Michigan law. We so hold for these death claims. The recent case of *Montgomery v. Stephan,* 359 Mich. 33, 101 N.W.2d 227 (1960) granted loss of consortium for a wife where the husband although not dead was "a physical and psychological wreck, a mere shell of manhood, unable to work effectively, on constant pain, scared, worried constantly, physically weak, and unable to enjoy even normal social life." pages 35 (Mich.),

228 (N.W.2d). If a husband dies instead of merely becoming a physical wreck after his tort injury, loss of consortium would be experienced at least until remarriage or some appropriate period, if not for the widow's remaining life. This loss of consortium rule was reaffirmed in *Westfall v. Benton,* 1 Mich. App. 612, 622, 137 N.W.2d 757, 762 (Mich. Ct. App. 1965):

> **(19)** To give full meaning to the term 'pecuniary injury' as contained in the death act as we interpret the spirit of the decisions of our Supreme Court in the Wycko, Currie and Heider Cases, and consonant with the intent of Reisig v. Klusendorf, supra, we conclude that recovery of damages for loss of society and companionship of a husband or wife under the death act is includable and proper.

G. *The value of love, companionship and guidance to adult emancipated children* of decedents is claimed under the Michigan Wrongful Death Act. If recognized, it applies only to defendant Den Norske. We do recognize this element as the Michigan court did in *Westfall v. Venton,* 1 Mich. App. 612, 620, 137 N.W.2d 757, 761 (Mich. Ct. App. 1965):

> A family unit, including all of its members, whether living under the same roof or not, is still a family unit. As a rule parents as they grow older acquire more wisdom and appreciation for their children, grandchildren, and the family unit. This enables them to exert through their concern, love, and companionship valuable guidance to the other members of the family, and strengthen the effective service of the family as a unit. The unlawful taking of the life of one of the members of a well-knit and close family unit, where love, and concern, abounds, severs this unit, with resulting pecuniary injury to the survivors. For such loss the survivors have an action under the death act.

We believe this development is but the logical outgrowth of the very early U. S. Supreme Court decision already cited, *Michigan Central R. Co. v. Vreeland,* 227 U.S. 59 (1912), which first recognized the entire family relationship as one unit capable of pecuniary measurement.

(20) H. *Prejudgment interest* for the total dollar value of all the pecuniary losses from date of death to date of judgment is granted. "The El Salvador," 248 F. Supp. 15 (S.D.N.Y. 1965), modified 364 F.2d 118 (2d Cir. 1966) and "The Mormackite," 285 F.2d 583, 592-595 (2d Cir. 1961) so held. In deciding for prejudgment interest, our opinion squarely contradicts the holding of our superior Sixth Circuit Court of Appeals in *Cleveland Tankers v. Tierney,* 169 F.2d 622 (6th Cir. 1948). In the twenty one years elapsing since the *Cleveland Tankers* decision, however, a generation of men and several generations of law have passed. The benefits of current legal thought and contemporary judicial decisions are before us. They reflect acceptance of prejudgment interest as a legitimate element of damages. We believe this element of damages is valid and respectfully urge the Sixth Circuit Court of Appeals to consider anew the issue in light of contemporary decisions, economic facts and the legal certainty that a debt due on the date of death is payable on the date of death; and a debt due but not paid, bears interest. We hold that the interest to be applied for the past four years is 5% which would have been available in a sound economic investment program. U.S. Treasury notes on May 7, 1965, yielded 4%. In March, 1969, similar conservative obligations yielded in excess of 6%. We take judicial notice of these facts. We hold that a conservative investment program would yield 5% interest annually as prejudgment interest. See *Economic Report of the President to the Congress,* January 1969, pp. 290-291.

Moreover, the discipline of a prejudgment interest payment will pressure, legitimately, the parties involved to proceed with dispatch to final judgment. Happily, in these proceedings of the *Cedarville* before the Commissioners, all parties and their counsel did proceed expeditiously **(21)** and needed no such discipline. But the rule we adopt will apply to all cases. Some may require this discipline of interest charges to encourage expeditious handling of claims both by the parties and their counsel.

II. Future Damages From Date of Judgment (May 7, 1969).

The elements of future damages are generally a continuation of those damages recognized up to date of judgment excepting the pain and suffering of the decedent and prejudgment interest. Three additional factors are added, however. The first is the earning capacity growth or loss of decedent which includes both his personal and individual qualities and the general economic characteristics of the nation's economy and the particular Great Lakes Maritime industry as represented by U. S. Steel Company. The second is an adjustment for the cost of living increase or decrease which would permit the beneficiaries not only to obtain the dollar *amount* representing the pecuniary losses on date of judgment but also to obtain the dollar *value* represented by the pecuniary losses on date of judgment. The third factor is to discount the lump sum payment on the date of judgment because it is a present payment of a future obligation. Beneficiaries have the use of the money before they are legally entitled to it since future damages should in theory be covered by future payments.

With these changes from the list of compensatory damages due to date of judgment, the elements of future damages need only be outlined in order to understand their meaning:

A. Loss of decedent's future earning capacity—wages plus such economic appendages as pension, hospitalization and medical benefits, savings fund plans, stock option plans, vacation plans plus reflection of any growth or loss in earning capacity based upon decedents personal qualities and the nation's general economic outlook as well as U. S. Steel's particular economic outlook

1. Adjustment for personal expenses of decedent

(22) 2. Adjustment for decedent's share of household expenses

3. No adjustment for taxes, Social Security payments or life insurance payments

B. Future value of decedent's services around the home

C. Future value of decedent's counsel, care and guidance to widow

D. Future value of decedent's counsel, care and guidance to minor children

E. Future value of loss of consortium to widow under Michigan Wrongful Death Act applicable only against defendant Den Norske

F. Future value of decedent's counsel, care and guidance to adult emancipated children under Michigan's Wrongful Death Act applicable only against defendant Den Norske

G. Adjust for loss or gain of dollar purchasing power

H. Discount for present payment of future pecuniary losses.

III. Attorneys Fees for Claimants in Compensatory Claims.

We reject legal fees as part of the pecuniary loss to claimants in these compensatory damage actions. Our reasons are several:

A. No authority has come to our attention wherein attorney's fees in a Jones Act cause of action have been allowed. We are acting under the exclusive authority of the Jones Act. A similar lack of authority appears for claims under the Michigan law.

B. The settlement stipulation of May 31, 1967, in these proceedings now under consideration makes no reference to attorneys fees. And if the stipulation were intended to include such an element of damage it must so express.

This determination on attorneys fees does not apply to any punitive damage proceedings which may be forthcoming.

Monetary Evaluation of the Pecuniary Losses in Death Claims.

Numerous cases can be read regarding the economic determination of what are the pecuniary losses in dollars and cents. Three very helpful decisions are: "The El Salvador," 248 F. Supp. 15 (S.D.N.Y. 1965), **(23)** modified 364 F.2d 118 (2d Cir., 1966); "Mission San Francisco," 236 F. Supp. 895 (Del. 1964) (especially Report of Commissioner, 24 January 1964); *Leroy v. Sabena Belgian World Airlines,* 344 F.2d 266 (2d Cir. 1965) (wrongful death action arising out of international air crash); *Brooks v. United States,* 273 F. Supp. 619 (S.C., 1967) (wrongful death arising under Federal Tort Claims Act).

Several guidelines emerge from these cases: many methods are used in the evaluation process, there is no

single method prescribed; the trial court has maximum discretion to adopt and to use the method it deems most reasonable under the different circumstances of each case, wide latitude is granted to the district courts by the appellate courts; when several death claims arise out of the same disaster all should be determined by the same method however, as the seamen went to a common grave the decision maker should use a common evaluation method; although different legal elements of damages and various economic techniques are utilized in the many cases of wrongful death and tortious injury when the final dollar awards are compared there is a singular thread which is woven through them all, they all "hang together," and present a reasonable relationship one to all the others, none are "out of line"; one final guideline is that the total dollar awards are increasing in value over the past decade, in a rather dramatic manner, for economic inflation as a way of life has enveloped personal death and injury awards as it has all facets of American society.

We have attached hereto a simplified analysis of nineteen death claims which have been awarded or settled in the past decade. The facts revealed, in a rather gross manner, reflect the operation of these several guidelines. See Appendix A.

(24)

GENERAL ANALYSIS OF EVALUATION THEORIES ON LOSS OF EARNING CAPACITY OF THE SEVERAL PARTIES.

Lamp claim (Hanson/Mann, attorneys). Two highly intelligent experts were presented: an economist, Dr. Norman H. Leonard, Professor of Economics at Ohio Wesleyan University, Delaware, Ohio, and an actuary, R. Graham Wood, Vice President and actuary of Retirement Plans, Inc., Cleveland, Ohio. Dr. Leonard used decedent Lamp's

earnings at date of death and projected them to the end of work-life expectancy. He then offered an excellent analysis of wage trends for the past 60 years in the United States. His conclusion was that a growth factor of 5% annually would be conservative to indicate the Lamp loss of future earning capacity. Mr. Wood introduced the mortality and work-life tables from an actuarial standpoint. A 4% discount to show present value of the future debt was imposed. Pension and welfare benefits were detailed with great specificity by these two experts.

Cook claim (Radka/Robb, attorneys). Most instructive testimony was presented by the economic expert in the person of Milton H. Spencer, Professor of Economics, Wayne State University, Detroit, Michigan. The factor of 6% was utilized by the expert witness to reflect the annual growth of the earnings based on productivity within the economy and inflationary tendencies. A discount of 5% for present payment of future obligations was applied. Pension and welfare benefits were calculated not with specificity as in the Lamp claim but as a 20% factor of future wage loss, emphasizing that the national average of fringe benefits equalled % of wages.

(25) *Haske/Fuhrman/Jones claims* (Freedman/Traverse attorneys). These claimants offered the expert evidence of a skilled labor official, Michael Gallagher, plus a very illuminating legal analysis of the work contracts covering the decedents. In addition written evidence of the cost of procuring pension and welfare benefits was submitted from a respected insurance firm.

U. S. Steel/Den Norske (Keig/Keenan, attorneys). The defense presented an able actuary Raymond G. Pearson of Towers, Perrin, Forster and Crosby, Cleveland, Ohio. Needless to say he presented a respectable but very conservative approach to the evaluation of loss of earning

capacities and pension and welfare benefits. He applied only a 3% growth rate from death date to judgment date with remaining work-life earning capacities to remain stable. He discounted a certain probability of decedents' deaths before the end of the actuarial work life age of 65. He reflected the instability in the Great Lakes maritime industry. He correlated pension and welfare benefits to the cost which decedents would have paid in based on how they had performed during life. In addition, certain fringe benefits as the Savings Fund Plan and the Vacation Plan were not included at full use in view of the demonstrated experience of decedents before their deaths. If these two fringe benefits were applied to their full extent, however, it was acknowledged by defendants that 7% of earnings would be a fair valuation for them.

We are especially grateful for the three different economic analyses submitted by defendants in each of the five death claims. The most interesting fact is that even defendants in utilizing the economic evaluation process can project three highly different award sums for the (26) same decedent, and each one has a reasonable basis for economic support.

	Analysis I	Analysis II	Analysis III Using "El Salvador" Method as Defendants Interpret that Method
Lamp	$153,316	$181,977	$169,190
Cook	$ 60,999	$ 68,473	$ 93,651
Haske	$ 86,048	$ 87,427	$133,917
Fuhrman	$ 40,931	$ 42,625	$ 95,667
Jones	$ 29,890	$ 32,614	$ 66,315

Note that in the *Fuhrman* and *Jones* claims a differential in excess of 100% is reflected depending on which method for economic evaluation one would use.

We now proceed to state the general process for our economic determinations in each claim for the crucial element of loss of earning capacity. We weighed in each case these factors:

A. Earnings of decedents at death and for the prior five years

B. Employment contract rights which decedents could have exercised to the maximum

C. Work and study habits of the decedents

D. Economic conditions, present and future, of the Great Lakes maritime industry

E. National economic growth patterns over the past decades and future predictions

F. Living habits of decedents to allot individual allowances and proper personal consumption shares, including each decedent's general net worth as represented by ownership of realty, automobiles, boats, etc.

We approach fringe benefits in the *Lamp* and *Cook* claims by using a 20% factor applicable to the family share of the earning capacity loss.

The difficulty in utilizing the detailed economic evaluations for fringe benefits presented in these five death claims rests on the fact that both claimants and defendants in each of these cases have used entirely different bases upon which to determine the gross earnings and then they have tied into these gross earnings the processes for evaluating fringe benefits. This (27) vital fact we did observe, however. In the *Lamp* case these fringes, as evaluated by the claimant's witness Dr. Leonard, represented 22% of the family's share of earning capacity loss: $86,000 fringe benefits including pension with $380,000 as worklife earnings after deducting personal consumption. Defendants in the same case reflected a fringe benefit factor slightly

over 19%: $40,669 fringe benefit value to $219,244 family share of work-life earnings. While in the *Cook* case, defendants' complex analysis reveals a fringe benefit factor slightly under 20% of the family share of work-life earning loss: $18,770 value of fringe benefits to $94,209 family share of work-life earnings. Claimant *Cook* used the process of determining the fringe benefit evaluation as 20% of the future wage loss.

A similar evaluation process for fringe benefit loss in the *Fuhrman, Haske* and *Jones* claims as far as claimants' evidence goes can be made by analysis of the work contract rights to which each decedent was entitled. We projected a study of annual fringe benefit rights under the employment contract for each of these three claimants and the cost to the family to procure these benefits. We then took the annual earning capacity which we determined. Note that we did not use what claimants emphasized was their annual earning capacity—the work contract rates which each was entitled to, but which each did not necessarily exercise. Work habits—not contract rights—determine loss of earning capacity. When we relied on our determination of the annual earning capacity plus the claimants' determination of the cost to procure the fringe benefits we find that fringe benefits for the *Fuhrman* claim represented 16% of the annual earning capacity ($1,301 **(28)** to $8,200), for the *Haske* claim the percentage is 22% ($1,826 to $8,200) and for the *Jones* claim fringe benefits cost were projected at 62% because of the decedent's advanced age and therefore high pension costs ($5,317 to $8,400).

Defendants' analysis of fringe benefits for the *Fuhrman, Haske* and *Jones* claims recognized only the inclusion of pension, hospitalization and medical, and life insurance. If we take defendants' sums representing the family share of future earnings and project the defendants'

fringe benefits valuation as a percentage thereof we find the following:

	Future Earning Loss to Family	Fringe Benefits	Defendants' Percentage of Fringe Benefits to Earning Loss	Claimant's Percentage of Fringe Benefits to Earning Loss
Jones	$ 35,400	11,345	32%	62%
Haske	110,126	10,379	10%	22%
Fuhrman	78,962	9,936	11%	16%

We find that fringe benefits in these three claims should be the following percentages of the loss of earning capacity in each case: *Fuhrman* 15%, *Haske* 15%, and *Jones* 40%. These percentages are based on work habits, life expectancies, estimated cost for procurement of fringe benefits which includes also a balancing of what benefits are applicable to each claimant.

The fringe benefit percentage in the prejudgment period is applied to the estimated annual earnings, because this period is past and reasonable certainty of economic facts is available. For the post judgment period we first deduct personal consumption from annual earnings then apply the fringe benefit percentage. Why? The time period covered is much longer; the possibility of early retirement exists; substantive changes in fringe benefits available and utilized may occur, basic industry economics may change. All these generate additional unknowns which demand a more conservative approach to meet the legal standard of reasonable probability.

(29)

GENERAL ANALYSIS ON DETERMINATION OF POST-JUDGMENT ADJUSTMENT FOR LOSS OR GAIN OF DOLLAR PURCHASING VALUE AND POST-JUDGMENT DISCOUNTING OF FUTURE DEBT TO PRESENT VALUES.

Prejudgment interest has been determined at 5%. We know what has occurred in conservative investment yields in the past four years so this determination has a reasonable probability which is what we seek for these awards. Only when we face the future does economic fog settle in. We feel our way. We place a 4% increase in the total awards to cover loss of dollar purchasing power. Claimants will be paid in today's dollars but they will spend these same dollars in the years ahead when the loss in purchasing value will be reflected in the same manner as has been experienced in the past. The evidence indicates this loss; the controversy is how much. We do not compound the 4% factor but apply it as a simple percentage to the total award. It might be within reason to compound the 4% annually but we select the more conservative approach in view of the uncertainties of future economic conditions. The price outlook which fixes the dollar purchasing power will rise in the years ahead. See *Economic Report of the President to the Congress,* January 1969, pp. 58-59. In 1968 this consumer price rise or dollar purchasing power loss was 4.8%. From where we are today the 4% non-compounded rate of increase appears reasonable.

We apply a 4% discount of the total award to cover present payment of the future obligation. Once again we face economic uncertainties. Over the past several decades this discount rate has moved between 2½% which claimants *Jones, Haske* and *Fuhrman* suggests as the true percentage and 5-6% which defendants urge us to apply.

We settle on 4% to be applied at simple interest not compounded.

The 4% increase for loss of dollar purchasing value and the 4% discount for present payment of future obligation cancel each other so these elements of damages are not included in the death or survivors' claims.

(30) CLAIM OF ALICE MARIE LAMP ADMINISTRATRIX OF ESTATE OF FRANK DONALD LAMP, DECEASED = $452,084

Frank Donald Lamp was Chief Engineer on the *Cedarville*. He died at his post in the engineroom performing his duties in the best tradition of the sea. He was a very successful businessman having reached the top rung of his personal work ladder in 1960 when he became a chief engineer. He was a very good family man. He had two homes—the family home in Rogers City, the summer home in Grand Lake. He had two automobiles and two boats. He and his family lived very well. Without question he was a most important segment of the Lamp family unit. All this ended disastrously on May 7, 1965. We seek now to reimburse for the pecuniary damages sustained by the family as a result of that disaster. Mr. Lamp was 46 years old at the time of his death. His wife was 43 years old at that time. One child Lamcon Frank was 15 years old and the other child Stuart Monty was almost 13 years old.

I. *Losses from May 7, 1965 to May 7, 1969*

A. Earning capacity loss= $99,072

Estimated earnings for 1965-6	$24,000
Estimated earnings for 1966-7	25,200
Estimated earnings for 1967-8	26,400
Estimated earnings for 1968-9	27,600
	$103,200

The evaluation of the earning capacity represents decedent's past performance and the indicated productivity growth.

A sum of $24,768 for Mr. Lamp's share of personal consumption is allotted based on a 24% factor which represents his allowance and share of the family earnings.

The value of all fringe benefits is determined to be 20% of the estimated earnings or $20,640, in accordance with the process explained *supra* p. 26 *et seq.*

(31) Recapitulation: Earnings	$103,200	
add: Fringe benefits	20,640	
	$123,840	
deduct 24% from earnings for decedent's personal consumption	24,768	
	99,072	
B. Decedent's services around home = $250 annually for 4 years		$1,000
C. Decedent's counsel and guidance to minor children = Lacom Frank $600 annually for 4 years $2,400 Stuart Monty $600 annually for 4 years $2,400		4,800
D. Conscious Pain and Suffering of Mr. Lamp for a definite period of minutes while the *Cedarville* capsized and sank in accordance legal opinion and factual findings regarding the sinking set forth *supra,* p. 3 *et seq.*		5,000
E. Decedent's counsel and guidance to widow—$1,000 annually for 4 years		4,000
Total sum applicable against both defendants =		$113,872

F. Widow's loss of consortium under Michigan Wrongful Death Act applicable only against defendant Den Norske = $500 annually for 4 years	2,000
Total due on date of death	$115,872
G. Prejudgment Interest at 5% annually for 4 years or 20% of total damages =	23,174
Total prejudgment damages	$139,046

II. *Future losses from May 7, 1969*

A. Earning capacity loss = $287,938

Mr. Lamp had 15 years of work life remaining. We use the annual earning capacity as $28,000 for these 15 years. For the first 2 years the family unit remains at 4 persons so deduction for personal consumption of decedent is 24% (32) annually. For the next 2 years the family unit is 3 since the older child reaches majority. The personal consumption of decedent then is 35%. For the last 11 years of the work-life the family unit is 2 members so decedent's personal consumption is 50%.

2 years × $28,000	56,000
Deduct 24% personal consumption	13,440
	42,560
2 years × $28,000	56,000
Deduct 35% Personal consumption	19,600
	36,400
11 years × $28,000	308,000

Deduct 50% for decedent's personal consumption	154,000	
	$154,000	
Total	232,960	
Fringe benefits =	46,592	
Based on 20% factor as explained *supra*, p. 28	$279,552	

Personal productivity improvement and general economic growth for the 15 years of work life remaining at 3% of total earning capacity. 3% of $279,552 = $8,386

	279,552	
	8,386	
	$287,938	

B. Decedent's services around home = 26 years of life expectance × $250 yearly — 6,500

C. Decedent's counsel and guidance to minor = — 3,600

Lacom Frank 2 years × $600 yearly	1,200	
Stuart Monty 4 years × $600 yearly	2,400	
	$3,600	

D. Decedent's counsel and guidance to widow = — 10,000

A lump sum of $10,000 is given since human relationships are adjusted by time and what is once lost is replaced by new forms of living and personal adjustments.

Total sum applicable against both defendants — $308,038

(33) E. Widow's loss of consortium under Michigan Wrongful Death Act applicable only against defendant Den Norske = A lump sum of $5,000 is given for the same reasoning in II D *supra*	5,000
F. Adult children's loss of family counsel under Michigan Wrongful Death Act applicable only to defendant Den Norske = None, for human relationships are adjusted after the father's death: 6 years for Lancom and 8 years for Stuart during which period they received counsel and guidance value as minor children	0
Total future damages	$313,038
Total sum due Lamp, Administratrix =	$452,084

* * * * *

Note: That portion of the Commissioner's awards and opinion relating to other death and personal claims are omitted as not relevant to this petition, which is filed solely on behalf of Alice Marie Lamp.

(96) CONCLUSION.

We are deeply grateful to all counsel for their cooperative efforts to resolve the complex legal and factual issues involved. The evaluation of human life and disability is always most difficult. The evidence presented, its manner of presentation and the vigorous advocacy extended during the hearings sharpened the issues for de-

cision. The excellence of the briefs which analyzed laws and facts aided us immeasurably to effect our awards.

Respectfully submitted,

OLIVER SCHROEDER, JR.,
Commissioner.

ROBERT J. GROGAN,
Commissioner.

May 7, 1969

Received and accepted this 7th day of May, 1969.

JAMES C. CONNELL,
United States District Judge.

DISTRICT COURT'S RULINGS ON OBJECTIONS AND REQUESTS FOR MODIFICATIONS TO COMMISSIONERS' AWARDS AND OPINIONS FILED MAY 7, 1969, AND COURT'S FINAL ORDERS, AWARDS, DECREES AND JUDGMENTS.

(Filed July 8, 1969.)

In Admiralty No. 65-6.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Ohio,
Eastern Division.

In the Matter of the Petition of

UNITED STATES STEEL CORPORATION,

As Owner of the Steamship Cedarville for Exoneration From or Limitation of Liability.

CONNELL, *J.*

The Court has reviewed in detail the following documents prior to the determination of all the objections filed and modifications requested concerning the Commissioners' Awards and Opinions submitted May 7, 1969.

1. Commissioners' Awards and Opinions, May 7. 1969 (Schroeder/Grogan)

2. Petitioners' objections to Commissioners' Report incorporating petitioners' answer briefs filed with the Commissioners prior to the awards of May 7, 1969 (Keenen/Keig) (filed May 20, 1969)

3. Objections to Commissioners' Report, Awards and Opinions on behalf of Barbara J. Fuhrman, Administratrix; Marion Jones, Administratrix; Elizabeth Haske, Administratrix; Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Ronald G. Piechan and Stanley P. Mulka (Freedman/Traverse) (filed May 29, 1969)

4. Brief in Support of Objections on Behalf of Barbara J. Fuhrman, Administratrix; Marion Jones, Administratrix; Elizabeth Haske, Administratrix; Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Ronald G. Piechan and Stanley P. Mulka (Freedman/Traverse) (filed May 16, 1969)

5. Brief in Opposition to Petitioners' Objections to Commissioners' Report in Behalf of Barbara J. Fuhrman, Administratrix, Marion Jones, Administratrix, Elizabeth Haske, Administratrix, Billy R. Holley, Michael Idalski, Jerome Kierzek, Raphael Przybyla, Walter Tulgetske, Ronald G. Piechan and Stanley P. Mulka (Freedman/Traverse) (filed May 29, 1969)

6. Petitioners' Response to Objections to Commissioners' Awards Filed on Behalf of Claimants Fuhrman, Haske, Jones, Holley, Idalski, Kierzek, Mulka, Piechan and Przybyla (Keenen/Keig) (note that Tulgetske omitted) (filed May 28, 1969)

7. Brief in Opposition to Objections of Petitioners to Commissioners' Report incorporating the Lamp brief filed with the Commissioner prior to the award of May 7, 1969 (Hanson/Mann) (filed June 5, 1969)

8. Motion to Modify Commissioners' Award in Claim of Alice Marie Lamp (Hanson/Mann) (filed June 5, 1969)

9. Petitioners' brief in Opposition to Claimant's Motion to Modify Commissioners' Award in claim of Alice Marie Lamp (Keenen/Keig).

COURT'S RULINGS.

The Court overrules all objections by all parties to the Commissioners' Awards and Opinions filed May 7, 1969. The Court further denies all modifications in the awards requested by any one or all of the parties. The Court on May 7, 1969, received and accepted the Commissioners' Awards and Opinions. The Court now this 8th day of July, 1969, promulgates the Commissioners' Awards and Opinions as the Court's Awards and Opinions and enters, as the final orders, decrees, awards, and judgments for all parties, the awards and opinions of the Commissioners dated May 7, 1969. The facts found and the laws applied by the Commissioners in their awards and opinions are accepted as the findings of fact and rules of law of this Court.

COURT'S OPINION.

All documents presented by the parties reveal the highly controversial factual materials presented in these claims. The Court after careful consideration believes that the findings of all facts by the Commissioners, such as the loss of earning capacity, fringe benefits, personal expenses and decedent's share of household expenses, life expectancy and work-life expectancy, pain and suffering, losses based on familial relationships, physical and mental disabilities, maintenance and cure, interest and discount percentages, economic productivity and purchasing power values and all other facts, are reasonable findings of fact by the Commissioners which this Court accepts and promulgates as its findings of facts.

The Court further recognizes these controversial rules of law involved in these claims:

1. No Deduction of Income or other Taxes.

2. Exclusion of Life Insurance and Social Security benefits from any consideration.

3. Granting of pre-judgment interest and *denial of post-judgment interest.*

4. Exclusion of the fact of remarriage by decedent's widow from any consideration.

5. Admission of certain letters, medical and insurance documents.

6. Admission of psychiatric evidence utilizing the words of claimants spoken to the psychiatrist retained as an expert witness.

The Court accepts and promulgates as its rules of law, not only the enumerated issues above but all controverted issues of law, and the Commissioners' determinations on each rule of law in controversy in each of these claims.

JAMES C. CONNELL,
United States District Judge.

Dated July 8, 1969.

JUDGMENT ON DECISION BY THE DISTRICT COURT.

(Entered July 8, 1969.)

In Admiralty No. 65-6.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Ohio,
Eastern Division.

In the Matter of the Petition of

UNITED STATES STEEL CORPORATION

As Owner of the Steamship Cedarville for Exoneration From or Limitation of Liability.

This action came on for trial before the Court, Honorable James C. Connell, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the claimants recover from the above petitioners the following judgments:

Alice Marie Lamp, Administratrix of the Estate of Frank Donald Lamp, deceased, the sum of $452,084.00;

Jean Cook, Administratrix of the Estate of Charles H. Cook, deceased, the sum of $194,491.00;

Barbara Fuhrman, Administratrix of the Estate of Arthur Fuhrman, deceased, the sum of $338,095.00;

Elizabeth Haske, Administratrix of the Estate of Stanley Haske, deceased, the sum of $308,702.00;

Marion B. Jones, Administratrix of the Estate of Eugene F. Jones, deceased, the sum of $149,414.00;

Jerome F. Kierzek, the sum of $88,860.00;

Stanley P. Mulka, the sum of $92,740.00;

Raphael Przybyla, the sum of $196,288.00;

Ronald G. Piechan, the sum of $82,160.00;
Billy R. Holley, the sum of $251,976.00;
Michael John Idalski, the sum of $89,420.00;
Walter Tulgetske, the sum of $195,888.00.

It Is Further Ordered that the costs of the case be assessed against the Petitioners.

Dated at Cleveland, Ohio, this 8th day of July, 1969.

James A. Green,
Clerk of Court.

OPINION OF THE COURT OF APPEALS.

Nos. 19,835-36-37-38-39.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

IN THE MATTER OF: The Petition of United States Steel Corporation and Petition of Den Norske Amerikalinje A/S owner of the M/S Topdalsfjord, for Exoneration from or Limitation of Liability.

UNITED STATES STEEL CORPORATION AND DEN NORSKE AMERIKALINJE A/S,

Appellants,

v.

ALICE MARIE LAMP, Administratrix of the Estate of Donald Lamp, Deceased, et al.

Appellees.

Appeal from the United States District Court
for the Northern District of Ohio,
Eastern Division.

Decided and Filed December 23, 1970.

Before: PHILLIPS, Chief Judge, and WEICK and PECK, Circuit Judges.

PECK, Circuit Judge. There are herein considered appeals perfected by two shipowners from judgments entered against them in favor of twelve injured parties or personal representatives of decedents and cross appeals by the latter groups protesting the alleged inadequacy of those

judgments. Appellants will sometimes herein be referred to jointly as "Shipowners" and separately as "United States Steel" and "Den Norske," respectively, and the injured parties and personal representatives of decedents as "Claimants." Claimants are seven seamen and five widows and administratrices of the estates of seamen who were allegedly injured or who lost their lives when the bulk carrier steamship *Cedarville* sunk in the Straits of Mackinac May 7, 1965. All such decedents and surviving claimants were members of the crew of that vessel.

The sinking of the *Cedarville,* owned by United States Steel, followed its collision with the Norwegian ship *Topdalsfjord,* owned by Den Norske. The collision occurred in a dense fog, and ten members of the *Cedarville* crew were lost and twenty more sustained injuries which resulted in the filing of claims. Five of the death claims and thirteen of the personal injury claims were settled during earlier stages of these proceedings, and we are here concerned with the remaining five claims of the next of kin of the decedents and of seven personal injury claimants. Petitions for exoneration from or limitation of liability were filed in the District Court[1] immediately following the disaster, followed by the filing of claims by the various claimants. Reference is made to the opinion of the District Court (276 F. Supp. 163) for a detailed statement of the facts,[2] which will be restated herein only to the extent required for present purposes. Punitive damages were awarded by the District Court against United States Steel,

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[1] Den Norske's petition was filed in the District Court for the Northern District of Illinois, Eastern Division, but was subsequently transferred to the Northern District of Ohio, Eastern Division, wherein the United States Steel Petition was originally filed.

[2] We are aware of Shipowners' dissatisfaction with that statement, and we do not by this reference adopt it.

which perfected an appeal from such award to this Court. We determined the award of punitive damages to have been error in a decision specifically providing that that determination would have no effect upon the awarding of compensatory damages to the various claimants. *United States Steel Corporation v. Barbara J. Fuhrman, Administratrix,* 407 F.2d 1143 (1969), *cert. denied,* 398 U.S. 958 (1970).

During the pendency of the punitive damages proceedings and appeal, a stipulation was entered into by counsel for all parties and approved by the Court. Under this stipulation the shipowners' petitions for exoneration and limitation of liability were denied and their claims dismissed with prejudice, and it was further provided that, subject to the right of review and appeal, the disposition of all claims for damages, excluding punitive damages, be determined by a commissioner to be appointed by the District Court. It was further stipulated that hearings concerning compensatory damages should proceed during the pendency of the punitive damage determination, which were to be submitted on stipulated portions of the record. As has been hereinabove indicated, the punitive damage issue has heretofore proceeded to finality.

Pursuant to this stipulation, the District Court appointed two Commissioners to receive the evidence with reference to all of the claims, and they in due course filed their Awards and Opinions for the various claimants. The District Court thereafter received and overruled objections and requests for modifications and accepted the facts found and law applied by the Commissioners in their awards and opinion "as the findings of fact and rules of law of this Court." By separate document of even date judgments in favor of the individual claimants for specified sums were entered and costs were assessed against the Shipowners. The amounts of the judgments are as follows:

Alice Marie Lamp, Administratrix of the Estate of Frank Donald Lamp, deceased	$452,084.00
Jean Cook, Administratrix of the Estate of Charles H. Cook, deceased	194,491.00
Barbara Fuhrman, Administratrix of the Estate of Arthur Fuhrman, deceased	338,095.00
Elizabeth Haske, Administratrix of the Estate of Stanley Haske, deceased	308,702.00
Marion B. Jones, Administratrix of the Estate of Eugene F. Jones, deceased	149,414.00
Jerome F. Kierzek	88,860.00
Stanley P. Mulka	92,740.00
Raphael Przybyla	196,288.00
Ronald G. Piechan	82,160.00
Billy R. Holley	251,976.00
Michael John Idalski	89,420.00
Walter Tulgetske	195,888.00

Before passing to a consideration of the separate items of damages itemized by the Commissioners in their determination of the claimants' awards, attention is directed to the issue presented concerning the scope of the present review. This issue was before us in the appeal dealing with the question of the allowance of punitive damages in the present case and we therein determined that "Rule 52(a) applied to the findings of fact of the District Judge . . . notwithstanding that he heard no live testimony at the trial. *Commissioner v. Duberstein,* 363 U.S. 278, 291; *United States v. United States Gypsum Co.,* 333 U.S. 364, 395." *United States Steel Corp. v. Fuhrman, Administratrix, supra*; see also *Commissioner of Internal Revenue v. Spermacet Whaling & Shipping Co.,* 281 F.2d 646 (6th Cir. 1960). Thus at the very least, despite the view expressed in the separate concurrence in *Fuhrman* that the determination expressed therein on this point and in *Spermacet*

constituted obiter dictum, the quoted conclusion is here controlling as the law of the case. Accordingly, we are here required to affirm the District Court unless we conclude its finding to have been "clearly erroneous" under the definition provided by the Supreme Court:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum, supra,* at 395.

It is against this yardstick that we measure the evidence of compensatory damages contained in the record.

I. PERSONAL INJURY CLAIMS.

For their experiences at the time of the sinking, and for their alleged physical and mental disabilities resulting therefrom, the seven personal injury claimants were awarded a total of $997,332. The individual awards ranged from $82,160 to $251,976, and included the following specific elements of damages; loss of earning capacity from the date of the accident to the date of judgment, and for future loss of earning capacity; pain and suffering experienced during the sinking, from the date of the sinking to the date of judgment, and for future pain and suffering; loss of life's pleasures from the date of the sinking to judgment, as well as future loss of life's pleasures; maintenance and cure to the date of judgment; and the cost of future medical services.

Before turning to a discussion of the specific elements of damages awarded to the personal injury claimants, a few comments of a general nature are deemed appropriate.

The first pertains to the nature of the Commissioners' Opinions and Awards themselves. Those Opinions and Awards, although designated by the Commissioners as their findings of fact and conclusions of law, are entirely

unsatisfactory in that respect. Despite the fact that these cases present difficult and complex issues of past and future damages, depending in large part on conflicting medical and psychiatric testimony, the Opinion and Awards for each individual claimant consisted only of a brief review of that testimony together with the claimant's testimony, and concluded with a bare conclusory finding such as:

> "We determine that the claimant Idalski was injured on May 7, 1965 and was damaged thereby."

In each instance a statement of this nature is followed by a listing of the dollar amounts awarded for each of the elements of damages allowed to the individual claimants.

We recognize that this abbreviated aspect of the Commissioners' findings here would not alone be sufficient to require reversal, especially since the findings were concerned with the question of damages rather than liability. Compare *Ginsburg v. Royal Insurance Company,* 179 F.2d 152, 153 (5th Cir. 1950) with *Matton Oil Transfer Corporation v. The Dynamic,* 123 F.2d 999, 1000-01 (2d Cir. 1941). But such findings are of little aid to intelligent appellate review. The appellate court is left to presume that the Commissioners accepted the claimants' evidence and based their awards on some combination thereof, but if some of that evidence is found upon review to have been incompetent, the court can only speculate as to the degree to which such evidence influenced the Commissioners.

The next comment is less general in nature, but it pertains to a threshold issue common to each of the personal injury claims. To a very large extent the awards assigned to the various elements of damages were grounded upon the testimony of claimants' psychiatric and orthopedic experts. With particular reference to

claimants' psychiatric expert, shipowners argue that he was a part of a "circle of advocacy" otherwise composed of the claimants and their attorneys, and that his testimony should be discredited as it was by the Commissioner in the *Matter of the Petition of Keystone Tankship Corp. and Keystone Shipping Co.,* In Admiralty, No. 16,994, United States District Court for the Western District of Washington, Northern Division (the *Bunkerhill*). Were we sitting as the triers of fact, or were we not required by the law of the case as established in *United States Steel Corporation v. Fuhrman, Administratrix, supra,* to follow the rule of *Gypsum,* the inclination to so discredit his testimony would be strong upon us. In the existing circumstances, however, we are required to accept that testimony unless we possess "on the entire evidence . . . a definite and firm conviction that a mistake has been committed," or unless we conclude his pertinent testimony was inadmissible in the premises and improperly received in evidence.

Considering the credibility issue first, we find before us a record in which virtually all of the objective evidence is inconsistent with, if not actually diametrically opposed to, the opinions which the psychiatric expert was permitted to place in the record. These opinions are of a curiously similar pattern with reference to each of the personal injury claimants, almost always concluding that each seaman suffered indescribable horrors and has had his future life warped by a "post-traumatic anxiety neurosis" —resulting from a half hour's immersion in the waters over which they traveled for a livelihood. These opinions were based almost exclusively on interviews conducted for the purpose of preparing testimony for presentation to the Commissioners. In many respects these expert opinions

failed to take into account such circumstances as pre-accident complaints and medical treatment for some of the conditions thereafter existing, and in connection with the dire prognostications do not recognize post-accident promotions and actual increases in earnings, nor satisfactory home and occupational adjustments.

An illustrative example is that of claimant Stanley Mulka. Mulka was sailing for the first time on the trip which culminated in the sinking of the *Cedarville*. Prior to sailing he had attended four years of high school and the first year of college at a Roman Catholic seminary, studying for the priesthood. He then had doubts about continued study for the priesthood, and these doubts apparently caused academic problems. He left college on academic probation early in 1965.

After the sinking Mulka abandoned his short-lived sailing career. He worked the remainder of the summer of 1965 as a plumber's helper and returned to college in the fall of 1965. Upon his return to college, he embarked on a course of study to prepare him to be a school teacher. His grades showed a marked improvement after his return to college, almost all A's and B's and he received an excellent rating as a student teacher. At the time of the hearing below Mulka was set to graduate from college, and he was virtually assured of a position as a teacher. In addition to his participation in normal college social life such as fraternities and special interest clubs, he had a steady girl friend and indicated plans of marriage.

Although Mulka testified that he suffered from constant headaches since the date of the accident and that he also suffered constant, sometimes excruciating, pain in his back, arms and hands since the date of the accident, cross-examination disclosed that he had sought medical

attention for headaches prior to the sinking as well as after, but that he had not bothered to seek medical treatment for the "excruciating" pain in his back, arms or hands since the date of the accident.

Claimants' psychiatrist, testifying solely on the basis of the history and symptoms related to him by Mulka, stated that he found Mulka to have deteriorated emotionally and scholastically after the date of the accident. He diagnosed his condition as a "moderately severe anxiety neurosis" which would prevent Mulka from maintaining a job as a school teacher and would disable him to some extent in any occupation he undertook. Cross-examination disclosed to the psychiatrist for the first time many significant facts such as Mulka's academic improvement upon his return to college after the sinking, his excellent rating as a student teacher, and the fact that he had sought medical attention for serious headaches prior to the sinking, but the doctor saw no need to change his diagnosis.

Such factors form the basis for our dissatisfaction with this testimony, and applying the test of *Gypsum,* on the basis of the entire evidence, we express a definite and firm conviction that a mistake has been committed. However, we do not reject this testimony on this ground alone.

The rules under which doctors (as well as other experts) are permitted, as an exception to the general rule, to express opinions have been carefully formulated. The most important of those rules for present purposes is that a medical opinion based upon the history and subjective symptoms related to a doctor solely for the purpose of enabling him to testify at trial is inadmissible. *Nashville, C. & St. L. Ry. v. York,* 127 F.2d 606, 611-12 (6th Cir. 1942); *Hardy-Burlingham Mining Co. v. Baker,* 10 F.2d 277, 281

(6th Cir. 1926); *Baltimore & O. R.R. v. Mangus*, 294 F.2d 761, 762 (6th Cir. 1924). *See Padgett v. Southern Ry.*, 396 F.2d 303, 308 (6th 1968). Shipowners contend that since the remarkably similar diagnoses of each claimant's alleged psychiatric disturbance were based solely on the medical history and subjective symptoms related to the psychiatrist by the claimants in order to qualify him to testify in their behalf, that opinion testimony was inadmissible.

Claimants do not challenge the correctness of this rule as it applies generally to the diagnosis of physical complaints, nor do they challenge the shipowners' assertion that the psychiatric diagnosis common to each claimant was based on the history and subjective complaints related to the doctor to qualify him to testify at trial. Rather, they claim an exemption from the general rule, arguing that the diagnosis of psychic disturbances require the evaluation of the patient's history and subjective complaints. Indeed, claimants contend that the history, subjective symptoms, attitudes and feeling elicited by the psychiatrist from his patient are the only bases for an evaluation and diagnosis of a psychiatric disturbance.

Whatever persuasive effect this argument might have is vitiated by the fact that it finds no support in the record, and certainly the bases for psychiatric diagnosis cannot be judicially noticed. If it is true that psychiatric evaluation must be based in large extent on subjective evidence, the time may come when a separate rule of law will evolve establishing different admissibility standards for opinions as to mental and physical disorders (or the absence thereof). However, if such a distinction is ever to be made, it must be on the basis of evidence justifying a different standard, which in turn must be established by the testi-

mony of experts. No such testimony is contained in the present record,[3] and we will not substitute our lay judgment in this peculiarly nebulous field for evidence.

Even were we to accept the claimants' argument in this regard, it would meet only one of the reasons underlying the general rule outlined above, that of the objectionable hearsay nature of the doctor's narration of his patient's history and subjective complaints upon which his opinion was based. A separate but related policy reason for the rule is the exclusion of medical opinion testimony based on what may well be the self-serving declarations of the plaintiff to the examining doctor. See *Padgett v. Southern Ry., supra.* Where the plaintiff consults a doctor solely to qualify him to testify in his behalf at trial, any state-

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[3] The only matter in the record remotely touching on this issue are the arguments of counsel at the time the objection to the admission of the psychiatric opinion testimony was made:

"Mr. Keig [Attorney for Den Norske]: Doctor, excuse me. I would like to object to the doctor testifying as to the history he took from this man. The law is clear that examining physicians may not state the history and that their opinion must be based upon evidence otherwise adduced.

"The Commissioner: I think that a history is proper at this time. If he is the treating doctor and saw him on February 25th, 1967, obviously for the purpose of treatment, or as an analyst, or for the purpose of testifying as an expert, I think he can testify as to that.

"Mr. Keig: Mr. Commissioner, that is exactly the point, and you are right. The thing here is he did not see him for treatment, but solely for examination for the purpose of testifying, and that forms the foundation for our objection, because the law is clear that in those cases he may not read his history.

"The Commissioner: Mr. Freedman. [Attorney for Claimants]

"Mr. Freedman: I don't offer the history which he obtained from the client as the truth of those statements. I offer them, as you said before—and this is consistent with the law, too. As a matter of fact, the law is universal on this point, that for the purpose of his making a diagnosis and

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ments made to the doctor must be highly suspect as a basis for a diagnosis. This is particularly true where, as here, the complaint is entirely subjective, the plaintiff has made no attempt to secure treatment for the complaint, and there is at least some divergence between the history and symptoms related to the doctor and those testified to under oath. Accordingly, we hold the psychiatric opinion testimony to have been improperly admitted in this case.

A somewhat different situation exists with respect to medical opinion testimony of physical impairment. Five of the personal injury claims, Holley, Idalski, Piechan, Przybyla and Tulgetske, offered the testimony of an orthopedic expert, who, like the claimants' psychiatric expert, was consulted by claimants solely for the purpose of enabling him to testify in their behalf at the hearing. At the outset of his testimony ship owners renewed their objection to the admission of any expert opinion testimony based upon the history related to the doctor by the claimant. Without explaining their inconsistent rulings, the Commissioners correctly ruled that the orthopedic expert would not be permitted to testify to the history given him by the claimants. In accordance with this ruling the orthopedist then testified to the symptoms observed by him during the examination of each claimant and stated his diagnosis of their various physical ailments based upon such observations. However, despite the ruling immediately prior thereto, with respect to the question of causation of the physical ailments he had diagnosed, the

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drawing any kind of a conclusion, he needs to have the history, and to that extent it is very relevant."

Whereupon the objection was overruled and the doctor proceeded to testify as outlined above, diagnosing the psychic disturbances of the claimants on the basis of the history and subjective symptoms related to him by the claimants.

doctor was permitted to state that in his opinion they were caused by "an incident of May 7, 1965."

The admission of this opinion testimony of causation was error. Nothing in the record discloses the basis for the doctor's opinion as to causation other than the history related to him by the claimants in the course of their examination. As stated above, the opinion of an examining physician based upon the history related to him by the plaintiff is inadmissible. *Nashville, C. & St. L. Ry. v. York, supra; Hardy-Burlingham Mining Co. v. Baker, supra; Baltimore & O. R.R. v. Mangus, supra; Padgett v. Southern Ry., supra.* However, the admission of this testimony was not fatal to the claimant's claims of physical impairment resulting from the sinking. In *Sentiles v. Inter-Caribbean Shipping Co.*, 361 U.S. 107 (1959), the Supreme Court held that the failure of any medical expert to testify that an accident aboard ship was the cause of a seaman's subsequent tubercular condition did not prevent the trier of the fact from inferring that the accident aboard ship was the cause. 361 U.S. at 109. We believe the erroneous admission of the opinion testimony of causation here creates a record in this case similar to that in *Sentiles*: no competent medical evidence of causation but sufficient evidence from which the Commissioners could infer that the physical disabilities diagnosed were caused by the sinking of the *Cedarville*.

In summary, with respect to the expert opinion testimony offered below in support of the claimants' allegations of physical and psychiatric disabilities, we are presented with a record which contains no competent evidence of psychiatric disturbances or disabilities but which does contain competent evidence of physical disabilities along with other evidence from which the Commissioners could properly infer a causal connection with the sinking

of the *Cedarville*. It is with these principles in mind that we turn to a discussion of the individual elements of damages awarded by the Commissioners.

a. Pain and Suffering.

The most constant item in the Commissioners' awards is, as it is described therein, "Pain and suffering for the May 7th event." Four of the claimants were awarded $15,000 each for this item, while two (Idalski and Tulgetske) were allowed $10,000 each and one (Holley) was awarded $20,000. As has been indicated above, the Commissioners' Opinions and Awards disclose little of the basis for such awards. Under the general caption "Pain and Suffering" they offer one lengthy but inappropriate quotation from American Law Reports but otherwise give no indication of the guidelines used in making their determination. Moreover, while Holley's situation is clearly distinguishable, it is difficult, if not impossible, to ascertain from the Commissioners' description of the experiences of the individual claimants during the sinking just what formed the basis for distinguishing Idalski's and Tulgetske's situation from those of the other four.[4]

The seven personal injury claimants were variously engaged at the moment of the collision of the *Cedarville* and the *Topdalsfjord*. Some were standing their regular watch; some were sleeping and were awakened by the noise and impact of the collision. However, all of the surviving claimants described the impact as relatively "soft," and none were injured by the impact of the collision itself.

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[4] An explanation for this distinction may be found in the fact that, according to the Commissioners' Awards and Opinions, Commissioner Grogan "assumed specific responsibility" for the awards in the Idalski and Tulgetske claims, while Commissioner Schroeder "assumed specific responsibility" for all of the other claims.

There then followed a period of time during which, despite the action of the crew members to halt it, the flow of water into the *Cedarville* rapidly increased. It therefore soon became apparent to the crew members that the *Cedarville* was going to sink and that it must be abandoned. In the resulting rush of events most of the crewmen were either thrown or required to jump into the water. They remained there for periods ranging from a few minutes to thirty to forty minutes before being picked up by their rescuers, but while in the water most were able to find their way to a life raft or a life boat within a matter of minutes.

A German ship, the *Weissenburg,* had been following the *Topdalsfjord* at a distance of about one mile, and its captain had "seen" the collision on his radar screen. The *Weissenburg* immediately moved into position to pick up the *Cedarville* crew, and, within the thirty to forty minute time period referred to above, all of the survivors had been taken aboard the *Weissenburg.* They were there given blankets, dry clothes and warm drinks. Soon thereafter they were transferred to the Coast Guard Cutter *Mackinac,* aboard which they went to Mackinac City, Michigan, and thence to Cheboygan, Michigan. With but one exception all of the survivors were taken to the Cheboygan Hospital for examination; Mr. Piechan declined to go to the hospital.

Following examination, none of the claimants were found to require hospitalization, and all were returned to their homes the same afternoon. Claimant Holley, complaining of back pains, returned to the hospital that evening, however. He stayed there one night, underwent further examination, including x-rays, with negative results, and was released by the hospital the following day.

In spite of what can only be regarded as deficiencies in the disclosure of the basis for the Commissioners'

Opinions and Awards, the awards to the individual claimants might be sustained on the basis of their individual testimony describing their personal experiences at the time of the sinking except for two factors. First, we regard the awards for pain and suffering on the occasion of the sinking as excessive. Second, we are clearly unable to conclude that the inadmissible but colorful testimony of the highly articulate psychiatric expert was not persuasive with the Commissioners. We thus have no alternative but to vacate these awards and to remand them for reevaluation and further findings on the basis of the present record exclusive of the incompetent psychiatric testimony.

Intervening chronologically between the pain and suffering items "For the May 7th event" and those for the future are the pain and suffering damages allowed for the four-year period from the sinking to the date of the District Court judgment, May 7, 1969. An award in the sum of $10,000 (on the basis of $2,500 per year) was allowed on this account to each of the claimants except for Idalski, who received a $12,000 award (on a $3,000 per year basis).

As in the case of the pain and suffering allowance "For the May 7th event," the Commissioners' Awards and Opinions set forth no satisfactory basis for the determination of these interim period awards (except that again Holley's situation is distinguishable and in Idalski's case, perhaps to justify the higher award made to him, passing mention is made of pains in the left leg, shoulder, shin and elbow area). However, also as in the case of the "For the May 7th event" awards, the fact remains that although there is some evidence in the record as to the claimants' discomfort for a past period, we conclude the amount of the awards to be excessive, and we are unable to say that the inadmissible testimony of the psychiatric expert was

not a factor in the determination thereof. Thus these awards must also be vacated and remanded for further findings and reevaluation without such testimony.

The awards for future pain and suffering, which ranged from $5,000 to Mulka (50 years, his life expectancy, at $100 per year) to $35,200 to Tulgetske (10 years at $2,000 per year and 15.2 years at $1,000 per year, for a life expectancy of 25.2 years), present a similar picture. While the basis of the Commissioners' awards for pain and suffering experienced during the events surrounding the sinking and until the date of judgment is less than satisfactory, the direct evidence from the claimants themselves provides some support for the awards. An award of damages for future pain and suffering cannot rest solely on the evidence of past pain and suffering, however. Competent medical testimony showing both diagnosis and prognosis is necessary before the trier of fact can reasonably find that pain and suffering will continue into the future.

As indicated above, all of the claimants here offered expert psychiatric testimony in support of their alleged future pain and suffering, and all but two of the claimants (Mulka and Kierzek) offered expert orthopedic testimony as additional support. Since we have already held, however, that the expert psychiatric testimony was improperly admitted into evidence and can provide no basis for any of the awards, to the extent that any award was based on such expert psychiatric testimony, it must fail. Accordingly, the awards to Mulka and Kierzek, being based solely on the incompetent psychiatric testimony, must fail completely. The awards to the other five claimants must fail in part also since it is clear that they were based in part on the incompetent psychiatric testimony. However, since, as has also been stated, it is impossible to discern from

the Commissioners' Opinions and Awards the extent to which those awards were grounded upon the incompetent evidence, we again refuse to substitute our judgment for that of the Commissioners and instead vacate the awards and remand for further findings and revaluation solely on the basis of the evidence here held to be competent.

b. Loss of Life's Pleasures.

The next category of awards, those for loss of life's pleasures, is closely related to the awards for pain and suffering in that evidence offered to support a claim for loss of life's pleasures generally parallels that required to support a claim for pain and suffering. Awards in this category have on occasion been made by courts to claimants who, by reason of their injury, are deprived of the opportunity to participate in the normal activities, social, athletic or recreational, in which a person without such injury could engage. *See e.g. Hanson v. Reiss Steamship Company,* 184 F. Supp. 545 (D. Del. 1960); *Vastano v. Partownership Brovigtank,* 158 F. Supp. 477 (E.D.N.Y. 1957); *Yates v. Dann,* 124 F. Supp. 125 (D. Del. 1954).

The Commissioners made awards in this category to each of the personal injury claimants ranging from $3,500 (to Mulka) to $65,200 (to Tulgetske). Here again the awards present the recurrent problem hampering appropriate appellate review in this case—the virtual absence of any indication from the Commissioners of their basis for the awards. To some extent the awards may have been based on the testimony of the claimants as to their inability to engage in certain activities since the date of the accident, but a study of the record precludes any conclusion but that the awards were also based in large part upon the diagnosis offered by claimants' psychiatric expert as to each claimant of a post-traumatic anxiety neurosis.

An illustrative example is that of claimant Jerome Kierzek. The only item in his testimony remotely connected to any impairment of his ability to enjoy the pleasures of life was his own testimony on direct examination that, following the sinking of the *Cedarville,* he acquired a fear of sailing which caused him to engage in heavy drinking. While it is doubtful that such testimony could be considered a proper basis for an award, even that basis is destroyed by his own testimony on cross-examination, which established that his drinking subsided shortly after his marriage a few months after the sinking. The remainder of his testimony provides no support for finding any reduction in any of his activities, social or recreational, or any domestic difficulties which could in any way be related to the sinking. To the contrary, Kierzek's testimony showed, among other things, that he loved his wife and child, that he got along well with them, that he enjoyed going out socially with his wife (although his opportunity to do so was severely limited during his two years overseas duty in the U.S. Army), and that he had received five promotions during the course of his two year tour of army duty. Moreover, as stated above, Kierzek offered no expert medical opinion testimony of any physical disability caused by the sinking which would impair his ability to engage in the normal activities of a man of his age and situation. The only testimony in the record which even approximates a basis for the Commissioners' award to Kierzek for loss of life's pleasures appears in the incompetent as well as incredible testimony of the claimants' psychiatric expert:

> "Q. Will [this anxiety neurosis] affect his life's pleasures? A. Yes, sir.
>
> "Q. In what respect? A. In that certainly, he cannot have the usual, normal pursuit of happiness that all of us, I believe, are entitled to.

"Mr. Keig: I would like to strike that conclusory statement. There is not one factual thing in that.

"The Commissioner: I was listening for something factual, too.

"Maybe he could give something factual as to how he is going to be denied life's pleasures.

"Q. Will you answer that question, Doctor? A. Yes, sir. I don't believe that he would get the pleasure out of being with people that other people do. I don't believe that he is able to enjoy the pleasures of, say, going to a movie, bowling, organizations that many men are accustomed to. I believe that he will not be as happy in his marriage as he would be without his anxiety neurosis."

As with the awards for pain and suffering, without the incompetent psychiatric opinion testimony as support, the awards for loss of life's pleasures are so grossly excessive as to be clearly erroneous. To the extent that any of the awards for loss of life's pleasures were based on the psychiatric testimony hereinabove held inadmissible, the awards must fail. A determination, however, of the validity of the awards in this group other than that to Kierzek requires a sifting and weighing of the evidence, a function more suited to the fact finder than to this Court. Accordingly, we again vacate and remand for further findings and reevaluation, on the basis of the present record exclusive of the incompetent psychiatric testimony, the awards for loss of life's pleasures to each of the personal injury claimants other than Kierzek. We hold that the award to him on this account is not supported by the record as a matter of law.

c. Loss of Earning Capacity.

Two items of damages allowed to each of the personal injury claimants were for loss of earning capacity for the four year period from incident to judgment, and for the

future, respectively. The awards made for the four year period may first be summarily disallowed. The Commissioners preface their determination of these awards with the abstruse statement, "The loss of earning capacity of the surviving seamen is measured by reasonable probability based upon evidence which permits the decision-maker to arrive at a pecuniary value of the loss." They then offer a resume of principles suggested as available for guidance in the determination of such loss, but like the quoted statement, they are without present application because the record is utterly void of evidence which would thereunder justify an award to any of the present claimants. While this further circumstance would not necessarily be fatal to the claims, the fact is that the record establishes that with the exception of Mulka who returned to college shortly after the sinking and Kierzek who entered the Army in March 1966, both of which circumstances were unrelated to the sinking, each of the claimants was compensated on a higher basis during the four year period than that under which he had been receiving compensation either immediately prior to the sinking or for the four-year period immediately prior thereto. The formula for determining the amount of an award for loss of earning capacity in this Circuit was enunciated in *Imperial Oil Ltd. v. Drlik*, 234 F.2d 4, 11 (6th Cir. 1956):

> "One who is injured in his person by the wrongful act of another may recover loss of time resulting therefrom and consequent loss of earnings, including future earnings, provided they are shown with reasonable certainty and are not merely speculative in character. The measure of damages in this field is fairly definite, and *the amount awarded is controlled by what the evidence shows concerning the earning capacity of the injured person before and after the accident.*" (Emphasis supplied.)

The Commissioners, and thus the District Court which adopted their conclusions without independent elaboration, simply ignore this teaching of *Drlik* without reference thereto. Similarly, although the application of *Drlik* is argued in shipowners' main brief, the answering brief of the personal injury claimants (and of three of the death claimants) makes only a passing comment to another aspect of *Drlik*.[5]

However we express reservations concerning the averaging out period used in *Drlik*. During one's progress through the working years of life his income normally shows at least some annual increase, with normally no decrease except as may be occasioned by personal or economic adversity until his declining years. For such use as it may be in the remand hereinafter directed, we therefore express the view that the base should be the higher of the year immediately preceding the incident or the average of the four years preceding it, unless the tortfeasor sustains the burden of showing that the single year was high for abnormal reasons. It was for that reason that

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[5] One brief filed in connection with one of the death claims inferentially attempts to discredit *Drlik* by arguing that it adopted the rule from two Second Circuit cases (*Porello v. U.S.*, 153 F.2d 605 (1946) and *Carroll v. U.S.*, 133 F.2d 690 (1943)), and then contending that these cases were subsequently overruled by *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266 (2d Cir. 1965). However, *LeRoy* is distinguishable on its facts and is entirely without present application. It is further argued that *Petition of Marina Mercante Nicaraguense, S.A.*, 248 F. Supp. 15 (S.D.N.Y., 1965), modified 364 F.2d 118 (2d Cir. 1966) (*The El Salvador*) reaffirmed the Second Circuit's rejection of *Drlik's* "averaging out" theory, but *The El Salvador* used the year prior to death as the base for awards, noting that these earnings were "consistent with . . . previous earning record[s]", and its conclusions are in no way inconsistent with those reached herein. The next year the Second Circuit in *Candiano v. Moore-McCormack Lines, Inc.*, 382 F.2d 961 (2d Cir. 1967), affirming the decision reported at 251 F. Supp. 654 (S.D.N.Y. 1966) approved the establishment of a claimant's earning capacity by averaging his earnings for the six years preceding the accident.

we earlier observed that these claimants had not shown a decrease in earning capacity for the four year period following the sinking when compared either to earnings immediately prior thereto or to the average of the four previous years,[6] and we restate the disallowance of those awards.

The problems faced in connection with future earning capacity are considerably more difficult than those involved in a consideration of earning capacity for a concluded period, as in this case the four years from incident to judgment. Where a past period is involved, in the absence of an affirmative showing to the contrary, the best evidence of earning capacity is the individual's actual earning record. As to the future, the same general principle of comparison of the claimant's earning capacity with and without injury applies. As the Second Circuit has stated:

> "The objective is to place the [claimant] in the same economic position as would have been his if the injury had not occurred. We seek to accomplish this goal by a formula which, stated in an oversimplified form, consists of determining what [claimant's] annual earning power would have been but for the injury, deducting what it will be thereafter, multiplying the result by [claimant's] [work life] expectancy, and discounting the product to present value." *Conte v. Flota Mercante Del Estado*, 277 F.2d 664, 669 (2d Cir. 1960).

While the general formula is easily stated, its application, in the evaluation of future earning capacity is less easy. However, again some principles of general application can

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[6] In *Drlik*, to determine lost earning capacity this Court used as a base the average of the plaintiff's earnings for the four year period immediately prior to the accident.

be stated. The claimant must first establish his normal annual earning capacity, which, in the absence of evidence of special circumstances indicating an ability to rise beyond his prior level of employment, would consist of a projection of claimant's earnings history, taking into account all available data relevant to wage adjustment. Next the claimant must establish the reduction, if any, in his earning capacity proximately resulting from the injury by showing the existence of some condition which demonstrably limits his opportunities for gainful activity. See e.g., *Wiles v. New York, C. & St. L. R.R.*, 283 F.2d 328, 331 (3rd Cir. 1960); *Conte v. Flota Mercante Del Estado, supra.* We gravely doubt that any such loss can be demonstrated from the record as to any of the present claimants, with the possible exception of Tulgetske and Holley, but once again it is impossible to tell from their Awards and Opinions what factual considerations motivated the Commissioners in this regard, and to what extent the emphatically articulated but inadmissible testimony of the psychiatric expert was persuasive. For this reason the awards made to all of the survivors for loss of future earnings will be vacated and remanded for further findings and reevaluation by the Commissioners.

d. Maintenance and Cure.

Awards for maintenance and cure to the date of judgment were made by the Commissioners to four of the personal injury claimants: Holley, Idalski, Przybyla and Tulgetske. The awards were calculated at the claimants' contractual rate of $8.00 per day for the 1461 days intervening between the date of the sinking and the date of judgment, less any days for which maintenance and cure had already been paid. Thus the award to each claimant was in excess of $11,000.

The principles of law governing an award for maintenance and cure are well settled. The law imposes a duty upon the master and owner of a vessel to provide his seamen with food and lodging if they should become sick or injured while in the ship's service. The duty begins with the inception of the disabling sickness or injury and continues until the seaman reaches maximum medical recovery. *Vaughan v. Atkinson,* 369 U.S. 527, 531 (1962). Presumably such time would normally be when the seaman voluntarily returns to work. The duty of the shipowner extends beyond the termination of the voyage, *Calmar S.S. Corporation v. Taylor,* 303 U.S. 525, 528 (1938), and it is not necessarily terminated by the seaman's resumption of some gainful employment if the shipowner has in effect forced the seaman to return to work by willfully ignoring his claim for medical attention. *Vaughan v. Atkinson, supra.*

Under the facts of this case we must conclude the awards to have been improper. As with so many of the other awards for the various elements of damage, it is once again difficult, if not impossible, to determine from the Commissioners' Opinions and Awards their basis for granting maintenance and cure. The itemization of the amounts awarded to the four claimants merely contains a cryptic notation such as:

> "He has not reached maximum medical recovery and is entitled to maintenance and cure at $8.00 per day for 1461 days."

The record suggests that, at least insofar as some of the claimants are concerned, the award was based on the testimony of claimants' expert psychiatrist who stated that the claimant was in need of psychiatric treatment from the date of the accident to the date of the hearing. Of course, to the extent any of the awards for maintenance and cure

were based on the psychiatric opinion testimony, which we have hereinabove held incompetent, they must fail. The validity of the awards need not rest on whether they were based on the incompetent psychiatric testimony, however, because there is no objective evidence that any of the claimants resumed gainful employment for reasons other than their voluntary determination to do so, nor is there any evidence that any of the claimants made any request for medical attention which was wilfully ignored by United States Steel.

> "A seaman by voluntarily working rather than using maintenance and cure to speed his recovery cannot by those tactics enhance the liability of the shipowner any more than the shipowner can be permitted to minimize his liability by refusing to pay and forcing the seaman back to work." *Pyles v. American Trading and Production Corporation*, 372 F.2d 611, 619 (5th Cir. 1967).

Accordingly the awards to Holley, Idalski, Przybyla and Tulgetske for maintenance and cure to the date of judgment are vacated.

e. Future Medical Services.

Under the heading "Cost of Medical Services" the Commissioners awarded to each of the seven personal injury claimants amounts ranging from $1,560 (to Kierzek) to $15,600 (to Przybyla and Holley) for the stated purpose of permitting the claimants to receive weekly or bi-weekly psychiatric treatment at the rate of $30 per treatment, for periods ranging from two to five years.[7]

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[7] The award to Kierzek was an exception to the other awards. His award for future medical services was for the purpose of enabling him to pay weekly visits to a general practitioner rather than seeking psychiatric treatment because of his stated fear of psychiatrists.

Unlike most of the other awards, the basis for the Commissioners' awards for the cost of future medical services is clear. The award to each personal injury claimant was based upon the statement of claimants' psychiatrist that the individual claimant was in need of psychiatric treatment for the period of time for which the award was made. Accordingly, in light of our holding herein that the testimony of claimants' psychiatric expert was incompetent and improperly admitted into evidence, the awards for future medical services, being based upon that testimony, must be vacated.

f. Recapitulation as to Personal Injury Claims.

As had been determined in detail above, certain items included in the judgments entered on account of the personal injuries alleged have been determined to have been erroneously included as a matter of law. Items falling in this category are the losses of earning capacity attributed to each of the seven claimants for the four year period from the date of the sinking to that of judgment, maintenance and cure allowed four claimants (Pryzbyla, Holley, Idalski and Tulgetske) for the four year period, future medical expenses allowed to all seven claimants, loss of future earning capacity allowed to one claimant (Mulka), and for the alleged loss of life's pleasures to one claimant (Kierzek). On the remand hereinafter ordered the District Court is instructed not to allow damages on account of any of these items. On such remand the District Court is further instructed to make further findings and re-evaluate every other allowance included in the judgments entered in favor of the various claimants, each of which allowances is specifically disapproved for the reasons hereinabove set forth. Such further findings and re-evaluation shall be made on the basis only of the evidence

herein held to have been properly received and in accordance with the principles herein enunciated.

II. DEATH CLAIMS.

The death claims present somewhat different issues than those which were presented in connection with the personal injury claims. With few exceptions there is no dispute about the personal representatives' entitlement to the various elements of damage necessary to compensate them for the "deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased." *Cleveland Tankers, Inc. v. Tierney,* 169 F.2d 622, 625 (6th Cir. 1948). Rather, the principal issues in the death cases turn upon the appropriate method of computation of those elements of damage in order to most accurately reflect the true value of the pecuniary loss to the decedents' families. The exceptions concern the awards against both United States Steel and Den Norske for pain and suffering undergone by the decedents in connection with the circumstances of their deaths and for the loss of care and guidance to the widows, and the award applicable only against Den Norske for loss of consortium and loss of care and guidance to the adult children under the Michigan Wrongful Death Act. These issues will be separately discussed.

a. Loss of Earning Capacity.

The primary elements of pecuniary loss to the families of the deceased seamen is, of course, the loss of the decedent's earning capacity, both for the interim period between the date of death and the date of judgment and for the remainder of the decedent's work-life expectancy. The basic factor of the lost earning capacity is the monetary wage which the decedent would have earned had he lived,

but earning capacity may also include the value of those fringe benefits which would inure to the benefit of the decedent's family had he lived.

In determining earning capacity loss from the date of death to the date of judgment, the Commissioners first appropriately looked to the decedents' actual earnings prior to death and selected as a base the highest of each decedent's annual earnings for the five years prior to his death. That base figure was then increased by 4% to 5% per year for each of the four years between the date of death and the date of judgment, such increases representing the Commissioners' views of the annual wage rate increases which the decedents would have received in each of the years from 1965 to 1969. The Commissioners then added to the total of lost earnings so computed a factor ranging from 15% to 40% of such earnings for lost fringe benefits, and from the total of such lost wages and fringe benefits the Commissioners deducted a percentage ranging from 10% to 30%, representing the decedent's personal consumption of such earning capacity.

The Commissioners' computation of future earning capacity loss was similar in many respects to the computation of such loss for the four year period. The earnings base selected by the Commissioners represented an approximation of their prior estimate of each decedent's earnings for the year of judgment, i.e., 1969. That base was then multiplied by the decedent's work-life expectancy, with deductions for the decedent's personal consumption, and to the total thus reached, the fringe benefit factor of 15% to 40% was added. A percentage of 2% to 4% of that total was then added as representing "personal productivity improvement and general economic growth."

Issues are raised here concerning almost every step in the Commissioners' computations of earning capacity

loss. Shipowners contend that the earnings base selected by the Commissioners for both the four year period and for the future was too high, that the Commissioners erred in assuming that the decedents would have received a wage rate increase of 4% to 5% for each year during the four year period and that the factors added in for fringe benefits and for "personal productivity and general economic growth" were excessive. Shipowners also contend that the Commissioners erred in failing to make an adjustment to the awards for earning capacity losses for the value of social security and life insurance benefits payable upon the deaths of the decedents and by failing to make an adjustment for the impact of future income taxes upon such earning capacity. On the other hand, claimants contend that the deductions from the estimated lost earnings for the decedents' personal consumption was grossly excessive and that the Commissioners erred in computing the awards on the basis of work-life expectancy rather than full life expectancy, arguing that the decedents would have worked for the remainder of their full life expectancy.

Turning first to the question of whether the Commissioners erred in refusing to make an adjustment of their determination of earning capacity loss for the impact of social security and insurance benefits, as well as future income taxes, we hold that there was no error in the refusal to make those adjustments.

Social security and insurance benefits payable to the widows and minor children surviving the decedents, even though paid for in part by the decedents' employer, do not represent partial payment of the shipowners' liability for the loss to the families of the decedents' earning capacities. Rather, they represent receipt of private or governmental contract rights which became fully executed and payable upon death without regard to the cause of death, and con-

trary to shipowners' assertion refusal to allow an "offset" for such benefits does not require them to pay twice for the same loss. *See United States v. Harue Hayashi,* 282 F.2d 599 (9th Cir. 1960). Shipowners' primary basis for their argument in favor of the adjustment is that the receipt of the social security and insurance benefits reduces the pecuniary loss to the survivors occasioned by reason of the deaths. Relying on the general principle of *Cleveland Tankers, Inc. v. Tierney, supra,* they contend that they are liable only for the pecuniary loss to the deceased seamen's surviving families. However, upon such reasoning any reduction in the pecuniary loss to the widows or children occasioned, for example, by a widow's remarriage or entry into the labor market, could likewise be justified. As the Commissioners concluded, such benefits are irrelevant to the measure of the earning capacity loss suffered by reason of the seamen's deaths for which the shipowners are liable.

The question of whether an adjustment for the impact of income taxes upon the award for loss of earning capacity should be made presents separate issues. Obviously, the earnings which the decedents would have received in the future had they lived, which is the theoretical basis for the award, would have had federal and other income taxes deducted, and an initially plausible argument can be made that the true reflection of future earning capacity loss must be preceded by an adjustment of the award for such taxes. However, we do not find that argument persuasive because the impact of such future taxes can not be predicted with reasonable certainty. The infinite variations of exemptions and deductions coupled with the possibility of changes in the tax structure which could occur over the span of a decedent's life expectancy could materially alter the impact of the income tax, and any adjustment for income tax either with or without

consideration of the possibilities for variation must constitute mere speculation on the part of the trier of fact. See *McWeeney v. New York, N.H. & H. R.R.*, 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); *cf. Sleeman v. Chesapeake & Ohio R.R.*, 414 F.2d 305 (6th Cir. 1969). We therefore adopt the rule that no adjustment for income tax need be made "at the lower or middle reach of the income scale." *McWeeney v. New York, N.H. & H. R.R., supra; Petition of Marina Mercante Nicaraguense, S.A.*, 364 F.2d 118 (2d Cir.), *cert. denied*, 385 U.S. 1005 (1967) (*The El Salvador*). We further hold that each of the anticipated future individual incomes involved in this case fall within that range and that the Commissioners' refusal to make an adjustment for income taxes did not constitute error.

We turn next to a consideration of the fringe benefits factor by which the Commissioners increased their awards for lost earning capacity by 15 to 40 percent. As in other instances, shipowners do not dispute the propriety of an award for fringe benefits. Rather they dispute the size of the awards and the Commissioners' failure to specify and evaluate each individual benefit included in the total. However, the record shows that both the shipowners and the claimants submitted extensive evaluations of each of the fringe benefits which would have been received by the decedents had they lived. The mere fact that the Commissioners converted the parties' evaluations of the benefits to percentages of the decedents' estimated lost wages for purposes of computation does not render the Commissioners' awards subject to attack for lack of specificity. Insofar as the size of the awards is concerned, the record shows that in some cases there is little variation in the parties' evaluations of the fringe benefit losses, and that in no cases are the Commissioners' awards beyond the

range suggested by the parties' own evaluations.[8] While we might not have proceeded in the same manner had the initial decision been ours, both the percentages and the method of computation chosen by the Commissioners find support in the record, and it cannot be said that they are clearly erroneous.

Lastly we turn to the first element of the Commissioners' computation of earning capacity loss, i.e., the earnings base upon which such computations were made. As stated above, the Commissioners chose as their initial base for computation each decedent's highest annual earnings for the five year period prior to his death. As we have hereinabove indicated in connection with the personal injury claims, however, the base should be the higher of the year immediately preceding the incident or the average of the four years preceding it. We believe the Commissioners' selection of the highest of the decedent's annual earnings for the five years prior to death to have been clearly erroneous. Moreover, after having so selected the initial earnings base, the Commissioners assumed each decedent's gross earnings would have increased by 4% to 5% per year for each year from the year of death to the year of judgment. The only apparent basis for such assumption on the part of the Commissioners was the testimony of expert actuaries and economists which tended generally to show that all wages tend to increase from 5% to 6% annually as the result of increased productivity

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	Claimant's Percentage of Fringe Benefits to Earnings Loss	Defendants' Percentage of Fringe Benefits to Earnings Loss	Commissioners' Percentage of Fringe Benefits to Earnings Loss
Lamp	22%	19%	20%
Cook	20%	20%	20%
Fuhrman	16%	11%	15%
Haske	22%	10%	15%
Jones	62%	32%	40%

and inflation. However, in making the assumption, the Commissioners apparently ignored the documentary evidence in the record in the form of the collective bargaining agreements under which the decedents would have continued to have been employed had they lived. Those agreements showed that the annual wage increase which the hourly employees would have been entitled to receive in the four years from date of death to the date of judgment approximated 1½% per annum, not the 4% to 5% per annum increase found by the Commissioners. Accordingly we hold that the earnings bases for the determination of earning capacity loss for both the four year period and for the future found by the Commissioners to have been clearly erroneous. In all other respects we find no error in the Commissioners' method of computation of earning capacity loss. The awards for earning capacity losses for both the four year period and for the future will be vacated and remanded for reevaluation in accordance with the foregoing.

b. Pain and Suffering.

As in the personal injury cases, the most constant item in the Commissioners' awards in the death cases was the award of $5,000 to each claimant for the pain and suffering undergone by each decedent prior to his death. Unlike the pain and suffering awards in the personal injury cases, however, the awards here present relatively uncomplicated issues upon review.

We note first that an award for pain and suffering is a proper element of damages in a Jones Act action for the recovery of the pecuniary loss resulting from the death of a seaman where it can be shown that the decedent experienced such suffering before his death. *St. Louis, I.M. & S.R. Ry. v. Craft,* 237 U.S. 648 (1915); *Cleveland Tank-*

ers, Inc. v. Tierney, supra at 626. Therefore, the issue for our determination is whether there was any evidence from which the Commissioners could reasonably find that the decedents experienced pain and suffering in connection with their deaths.

Shipowners do not dispute the propriety of an award for pain and suffering, but they vigorously contend that no award for pain and suffering was justified in any of the death cases here because there was no evidence of any of the circumstances surrounding the deaths of the crewmen, much less any affirmative evidence that those crewmen experienced pain and suffering at that time. We disagree. An eyewitness account of the circumstances of the deaths is not essential to such an award. Such evidence does, however, establish that some of the decedents were last observed performing their assigned duties below deck after the collision between the *Cedarville* and the *Topdalsfjord*. During this period of time the *Cedarville* was rapidly taking on water despite the efforts of the crew to halt it, thus permitting the inference that these decedents met their deaths by drowning in those inrushing waters while engaging in an unsuccessful struggle to save the ship. Moreover, it must be remembered that the survivors described the impact of the *Cedarville* and the *Topdalsfjord* as relatively "soft," thus permitting the further inference that it was unlikely that any of the decedents would have been rendered unconscious prior to their final moments. Other decedents were last observed on the deck or in lifeboats but presumably were hurled into the water as the ship capsized and sank. These circumstances, too, give rise to the almost inescapable inference that those crewmen died by drowning, and nothing in those circumstances suggests that they were rendered unaware of their fate. Under such circum-

stances, an award for pain and suffering cannot be said to be error. See *Grantham v. Quinn Menhaden Fisheries, Inc.*, 344 F.2d 590 (4th Cir. 1965); *Petition of Marina Mercante Nicaraguense, S.A., supra,* 248 F. Supp. 15, 28 (S.D.N.Y. 1965) (*The El Salvador*); *Meehan v. Central R.R.*, 181 F. Supp. 594, 625-26 (S.D.N.Y. 1960).

Having thus determined that there was sufficient evidence from which the Commissioners could find that the decedents experienced pain and suffering prior to their deaths, our review with respect to this issue is closed. Despite claimants' assertion that the awards of $5,000 were adequate in light of the "excruciating and agonizing suffering that decedents experienced" and shipowners' implicit argument that the amount was excessive, we will not attempt to substitute our judgment for that of the Commissioners. The awards for pain and suffering in the death cases will not be disturbed.

c. Loss of Consortium and Loss of Counsel and Guidance to the Widows and Loss of Love, Companionship and Guidance to the Adult Emancipated Children.

In the course of their determinations in the death cases, the Commissioners awarded sums to the widows of the deceased seamen for the loss of their husband's counsel and guidance and also for their loss of consortium, and sums to the adult emancipated children for the value of the love, companionship and guidance which those children would have received from their decedent. The propriety of these awards is the basic issue common to all.

As has been noted elsewhere, the jurisdictional basis for the death claims against the defendant United States Steel was the Jones Act, 46 U.S.C. § 688 (and by incorporation, the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq.) because the deceased crewmen were em-

ployees of United States Steel. The basis for corresponding claims against defendant Den Norske was the general maritime law as supplemented by the Michigan Wrongful Death Act (M.C.L.A. § 600.2922), because of the absence of any employer-employee relationship between the decedents and Den Norske and the occurrence of the accident within the territorial waters of the State of Michigan. Under those statutes the liability of both defendants is limited to the pecuniary loss occasioned by the death of the family head, and the issue presented with respect to each of the above named items for which the Commissioners made awards is whether those items can properly be considered elements of pecuniary loss arising out of the decedents' deaths.

More specifically, the issue with respect to the awards for loss of counsel and guidance to the widows is whether loss of counsel and guidance is a proper element of pecuniary loss in a Jones Act action for damages by an administratrix of a deceased seaman.

The touchstone for any consideration of the propriety of an award in a Jones Act case for the loss of a decedent's counsel, care and guidance is *Michigan Central R.R. v. Vreeland*, 227 U.S. 59 (1913). In that case, an action under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., to recover damages for the wrongful death of a railroad employee, the Supreme Court held that the trial court committed prejudicial error in permitting the jury to consider and award damages to the decedent's widow for the loss of the care and advice of her husband. After reiterating the rule that damages in an FELA action, as in a Jones Act action, are limited to the pecuniary loss incurred by reason of the decedent's death, the Court stated in relation to the charge therein that it "threw the door open to the wildest speculation. The jury was no longer

confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way." 227 U.S. at 73. Since the Supreme Court's decision in *Michigan Central*, no case arising under the Jones Act to which we have been referred by the parties or which has been disclosed by our own research has permitted an award for the loss of the widow of the decedent's care and guidance. *See e.g., Petition of Marina Marcante Nicaraguense, S.A.*, 248 F. Supp. 15 (S.D.N.Y. 1965), *modified* 364 F.2d 118 (2d Cir. 1966); *Petition of Oscar Tiedemann & Co.*, 236 F. Supp. 895 (D. Del. 1964); *Petition of Petroleum Tankers Corporation*, 204 F. Supp. 727 (S.D.N.Y. 1960); *Petition of Moore-McCormack Lines, Inc.*, 184 F. Supp. 585 (S.D.N.Y. 1960), *modified sub nom, Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir. 1961).

Notwithstanding the paucity of authority to support such an award, the claimants and the Commissioners seize upon certain language in *Michigan Central* to justify the awards, as follows:

> "It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements 'care and advice.' But there was neither allegation nor evidence of such loss of service, care, or advice." 227 U.S. at 74.

Claimants contend that here there were allegations and evidence of loss of care and advice and that the awards should therefore be permitted to stand. We disagree. The entire thrust of *Michigan Central* is that the pecuniary loss standard of FELA and Jones Act cases requires specific evidence of both the nature of the services

lost and the cost of obtaining such services elsewhere. The Court stated:

> "[T]he word[s] [pecuniary loss] as judicially adopted [are] not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, *and which can only be supplied by the service of another for compensation.*" 227 U.S. at 71. (Emphasis supplied.)

The Court further stated:

> "A minor child sustains a loss from the death of a parent, and particularly of a mother, of a kind altogether different from that of a wife or husband from the death of a spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nuture, and of intellectual, moral and physical training, *such as when obtained from others must be for financial compensation.*" 227 U.S. at 73. (Emphasis supplied.)

We believe these excerpts must be read as limiting an award for loss of care and guidance to those cases in which the services of the decedent constituting such care and advice can be enumerated and their replacement value estimated. Here there was no evidence of the nature of the care, guidance or counsel which the decedents gave to their wives prior to their deaths which could "only be supplied by the service of another for compensation," much less any showing that any such care or counsel had any pecuniary value. Under such circumstances the award was improper and must be vacated. *Cf. First National*

Bank of Greenwich v. National Airlines, Inc., 288 F.2d 621 (2d Cir.), cert. denied, 368 U.S. 589 (1961); *Meehan v. Central R.R.*, 181 F. Supp. 594 (S.D.N.Y. 1960).

The precise issue with respect to the Commissioners' awards for loss of consortium to the widows and for loss of love, companionship and guidance to the adult children, applied only against defendant Den Norske under the Michigan Wrongful Death Act, is whether the definition of pecuniary loss is to be governed by the principles of the general maritime law or by Michigan law interpreting that state's wrongful death statute. If the principles of general maritime law control, the awards for loss of consortium to the widows were improper because the general maritime law does not recognize that item as an element of pecuniary loss. *Igneri v. Cie de Transports Oceaniques*, 323 F.2d 257 (2d Cir.), *cert. denied*, 376 U.S. 949 (1964); *Simpson v. Knut Knutsen, O.A.S.*, 296 F. Supp. 1308 (N.D. Cal. 1969); *Valitutto v. D/S I/D Garonne*, 295 F. Supp. 764 (S.D.N.Y. 1969). But Michigan courts construing that state's wrongful death statute have permitted awards to widows for loss of consortium (e.g., *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227 (1960)).[9]

While the question is one of first impression in this Court, we believe that under recent developments in the law the entire proceedings against Den Norske, including the measure of damages, are governed by the principles of maritime law.

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[9] The awards to the adult emancipated children for loss of love, companionship and guidance need no further discussion as it is now clear that such an award is not an element of pecuniary loss under the Michigan Wrongful Death Act (*Breckon v. Franklin Fuel Co.*, 383 Mich. 251, 174 N.W.2d 836 (1970), and there is no contention that such an award is a proper element of damage under the general maritime law.

The Commissioners' determination to apply Michigan law to the question of the measure of damages applicable to Den Norske appears to have resulted from their misplaced reliance upon certain language in *Michigan Central v. Vreeland, supra,* but that determination had some basis in light of the then existing state of the law. Prior to its decision in *Moragne v. States Marine Lines,* 398 U.S. 375 (1970), the Supreme Court had uniformly held that there was no liability for wrongful death under the general maritime law, and that absent a statutory right thereto, there could be no recovery by the next of kin of a decedent killed as the result of a maritime tort. Such was the rule of *The Harrisburg,* 119 U.S. 199 (1886), but its venerable teaching was specifically overruled by *Moragne v. States Marine Lines, supra.* Long before the overruling of *The Harrisburg,* the stringency of its rule denying recovery for wrongful death in admiralty under the maritime law led to the creation of exceptions to that rule. One of the judicially created exceptions to the stringent rule of *The Harrisburg* was that "where death . . . results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given." *Western Fuel Co. v. Garcia,* 257 U.S. 233, 242 (1921).

The development and application of this exception to the general rule denying recovery inevitably led to questions of the appropriate substantive law to be applied where recovery was sought in one jurisdiction under a right created by another jurisdiction. In response, the courts fashioned a test of looking to the origin of the right sought to be enforced, holding that the court was bound to apply the law of the jurisdiction in which the right

originated. *See The Tungus v. Skovgaard,* 358 U.S. 588 (1959); *Garrett v. Moore-McCormack,* 317 U.S. 239 (1942); *Curtis v. Garcia* Y *Cia,* 241 F.2d 30 (3rd Cir. 1957). While it does not appear that the Commissioners engaged in such a reasoning process in making their determination, application of the test set forth above could lead to the result that the measure of damages applicable against Den Norske was to be governed by the Michigan courts' interpretation of the Michigan Wrongful Death Act since, prior to *Moragne v. States Marine Lines, supra,* the claimants' right to recovery against Den Norske was rooted in that statute.

The decision of the Supreme Court in *Moragne v. States Marine Lines, supra,* which held that an action does lie under the general maritime law for wrongful death caused by a maritime tort, changes that result. Creation of a right of recovery for wrongful death under the maritime law eliminates the need for both the exception to the rule denying recovery and for the tests designed to implement that exception and permits all facets of that right of recovery, including the measure of damages, to be governed by the principles of the maritime law. We therefore hold the awards for loss of consortium to the widows and for loss of love, companionship and guidance to the adult children, applicable only against Den Norske, to have been error. In so holding we recognize that in the proceedings below liability against Den Norske was premised upon the Michigan Wrongful Death Act. However, liability had never been in issue in this case, so the Supreme Court's creation of an additional or alternative basis for Den Norske's liability to the death claimants is of little importance compared to the pervasive issue with respect to all claims, i.e., the appropriate measure of damages. Recognition of a right of recovery for wrongful death

under the general maritime law strongly dictates that in order to promote the uniformity and supremacy of the maritime law (*See Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917)), the measure of recovery must be governed by the principles of that law where, as here, there is a conflict between the damages recoverable under the general maritime law (*Igneri v. Cie de Transports Oceaniques, supra; Simpson v. Knut Knutsen, O.A.S., supra; Valitutto v. D/S I/D Garonne, supra*) and those recoverable under state law (*Montgomery v. Stephan, supra*). Accordingly, upon the remand hereinafter ordered, the District Court is instructed not to allow damages to any claimants with respect to either loss of consortium to the widows or loss of love, companionship and guidance to the adult emancipated children.

d. The Awards of Prejudgment Interest and the Failure to Discount Future Damage Awards to Present Value.

The two remaining significant issues can be quickly disposed of since they represent instances of the Commissioners' clear disregard of well established law of this Circuit.

In each of the death cases the Commissioners awarded prejudgment interest for the total dollar value of the awards from the date of death to the date of judgment. Such an award of prejudgment interest was error. *Cleveland Tankers, Inc. v. Tierney*, 169 F.2d 622 (6th Cir. 1948).

The second issue concerns the Commissioners' failure to discount to present value the awards for future damages in all of the cases. The Commissioners' refusal to include in their computation of damages a reduction of future

damages to present value was based upon their assumption that inflationary trends resulting in a loss in the purchasing power of the dollar by 4% per annum would offset any reduction to present worth at 4% simple interest. This was error. It is well settled that an award for future damages must be reduced to present value in order to take into account the earning power of that money. *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 491 (1916). It is equally well settled in this Circuit that the prospect of a future decline in the purchasing power of the dollar may not be used to offset the reduction to present value. *Sleeman v. Chesapeake & Ohio Ry.*, 414 F.2d 305 (6th Cir. 1969).[10]

Accordingly, in conjunction with the remand hereinabove directed, the District Court is directed to discount to present value all awards for future damages in accordance with generally accepted actuarial principles.[11]

e. Recapitulation as to Death Claims.

Items in the death claims which we have hereinabove determined were erroneously included in the awards as a matter of law are the awards to the widows for the loss of consortium and for the loss of their decedent's counsel,

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[10] In an attempt to salvage the Commissioners' determination that an offset was justified, claimants contend that the failure to discount to present value would be more than offset by future wage rate increases which they contend the Commissioners ignored. There is no competent evidence in the record to support this contention.

[11] We recognize that the determination of the discount rate to be applied to an award for future damages rests within the sound discretion of the District Court. While we have serious reservations about a discount rate at 4% in light of the available return on investments today, we cannot say that the Commissioners' selection of 4% was an abuse of discretion. However, as pointed out above, such rate should be compounded in accordance with generally accepted actuarial principles.

care and guidance, the awards to the adult, emancipated children for loss of love, companionship and guidance and the award of prejudgment interest on the total value of the awards for the interim period between the date of death and the date of judgment. On remand the District Court is instructed not to allow damages on account of these items. On such remand the District Court is further instructed to reevaluate and recompute the earnings capacity loss of each death claimant in accordance with the principles herein enunciated, specific reference being to the determination of the proper earnings base for the computation of such earning capacity loss. The District Court is further instructed to discount to present value that portion of the award to each death claimant representing future damages in accordance with the principles herein enunciated. (Such instruction also has application to the personal injury claims; the District Court is similarly instructed to discount to present value that portion of the award to each personal injury claimant representing future damages.) In all other respects, no error is found to have intervened in the determination of damages in the death claims.

III. CONCLUSION.

The judgments of the District Court are vacated, and the causes are remanded for further proceedings consistent with the foregoing.

JUDGMENT OF THE COURT OF APPEALS.

No. 19,836.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

In the Matter of the Petition of United States Steel Corporation and Petition of Den Norske Amerikalinje A/S Owner of the M/S Topdalsfjord, for Exoneration from or Limitation of Liability.

UNITED STATES STEEL CORPORATION AND
DEN NORSKE AMERIKALINJE A/S,
Petitioners-Appellees,
vs.
ALICE MARIE LAMP,
Claimant-Appellant.

BEFORE: PHILLIPS, Chief Judge, WEICK and PECK, Circuit Judges.

JUDGMENT.

(Filed December 23, 1970.)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and the case remanded for further proceedings consistent with the opinion.

Each party to pay his own costs on appeal.

Entered by order of the Court.

CARL W. REUSS,
Clerk.